81-1863

No.

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MARC RICHMAN
KAREN CZAPANSKIY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether 40 U.S.C. 13k, which prohibits picketing, leafleting, and demonstrating in the Supreme Court building and on its grounds, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the United States, the appellants are Alfred Wong, Marshal of the Supreme Court of the United States; James Zagami, Chief, Supreme Court Police; and John H. Drexhagen, Officer, Supreme Court Police. The appellees are Mary Terese Grace and Thaddeus Zywicki. The Chief Justice was named as a defendant in the district court and as an appellee in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
The question is substantial	6
Conclusion	15
Appendix A	1a
Appendix B	50a
Appendix C	52a
Appendix D	56a
Appendix E	70a

TABLE OF AUTHORITIES

Cases:

A Quaker Action Group v. *Morton*, 516 F.2d 717.. 14
Adderley v. *Florida*, 385 U.S. 39 .....8, 9, 12
Carey v. *Brown*, 447 U.S. 455 .....7, 8, 14
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 7
Cox v. *Louisiana* (*Cox I*), 379 U.S. 536 8
Cox v. *Louisiana* (*Cox II*), 379 U.S. 559 ....4, 6, 8, 9, 10, 11, 13, 14
Erznoznik v. *City of Jacksonville*, 422 U.S. 205.... 7
Grayned v. *City of Rockford*, 408 U.S. 104 .....6, 7, 12
Greer v. *Spock*, 424 U.S. 828 .....8, 10, 12
Hague v. *CIO*, 307 U.S. 496 13
Heffron v. *International Society for Krishna Consciousness, Inc.*, No. 80-795 (June 22, 1981) 7, 8, 13
Hudgens v. *NLRB*, 424 U.S. 507 14
Jeannette Rankin Brigade v. *Chief of Capitol Police*, 342 F. Supp. 575, aff'd, 409 U.S. 972 14

Cases—Continued

	Page
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119	12
Lehman v. *City of Shaker Heights*, 418 U.S. 298	12
Metromedia, Inc. v. *City of San Diego*, No. 80-195 (July 2, 1981)	13
Niemotko v. *Maryland*, 340 U.S. 268	7
Prichard v. *United States*, 339 U.S. 974	15
Sloan v. *Nixon*, 419 U.S. 958	15
United States v. *Will*, 449 U.S. 200	15
United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548	10
United States Postal Service v. *Council of Greenburgh Civic Associations*, No. 80-608 (June 25, 1981)	8, 9, 12-13
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748	7

Constitution and statutes:

United States Constitution, First Amendment	3, 6, 8, 11, 13, 14
18 U.S.C. 1507	4, 6, 8, 10, 11
28 U.S.C. 455(a)	14
28 U.S.C. 455(b)	14
28 U.S.C. 1252	15
28 U.S.C. 2109	15
40 U.S.C. 13k	*passim*
40 U.S.C. 13n	2
40 U.S.C. 13p	2

Miscellaneous:

H.R. Rep. No. 212, 75th Cong., 1st Sess. (1937)	15

In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-49a) is reported at 665 F.2d 1193. The opinion of the district court (App. D, *infra*, 56a-68a) is reported at 524 F. Supp. 815.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 50a-51a) was entered on September 8, 1981, and a petition for rehearing was denied on November 12, 1981 (App. C, infra, 52a). A notice of appeal (App. E, *infra*, 70a) was filed on December 11, 1981. On February 2, 1982, Justice Brennan extended the time for docketing the appeal to and including April 9, 1982. The jurisdiction of this Court is invoked

under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

STATUTORY PROVISION INVOLVED

40 U.S.C. 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

STATEMENT

40 U.S.C. 13k prohibits the "display [of] * * * any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the Supreme Court building or on its grounds.[1] The Marshal of the Supreme Court, who supervises the Supreme Court police in their enforcement of Section 13k (see 40 U.S.C. 13n), interprets it to prohibit all picketing, leafleting, and demonstrating (App. A, *infra*, 6a-7a n.7).

On three occasions between May 1978 and February 1980, appellee Zywicki stood on the Supreme Court grounds and attempted to distribute leaflets. One leaflet concerned the removal of unfit federal judges; the others discussed Central American politics (App. A, *infra*, 3a-4a; App. D, *infra*, 57a-58a). Each time, an officer of the Supreme Court Police advised Zywicki that his conduct was prohibited, and he left the Supreme Court grounds. Appellee Grace learned of these events, and in March 1980 she stood

---

[1] The Supreme Court grounds extend to the curb on each side of the square block on which the Court is situated. 40 U.S.C. 13p.

on the Supreme Court grounds with a sign, approximately four feet by two and one-half feet, that recited the words of the First Amendment. She, too, left the grounds after receiving a warning from a Supreme Court Police officer (App. A, *infra*, 4a; App. D, *infra*, 56a-57a). Two months later, appellees brought this action in the United States District Court for the District of Columbia, seeking a declaration that Section 13k is unconstitutional on its face and an injunction against its enforcement (App. A, *infra*, 4a).

The district court dismissed appellees' complaint,[2] but a divided court of appeals reversed and held Section 13k unconstitutional on its face (App. A, *infra*, 30a). The court first ruled that "whenever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest—whether that interest derives from the very nature of the property itself, or from some other source" (*id.* at 19a). The court acknowledged that "[s]ubstantial governmental interests certainly * * * justify restrictions on picketing and other forms of expression in and near courthouses" (*id.* at 20a). It noted the need to protect against "influence or domination of the judiciary by public pressure," because "arguments to courts properly are presented in official pleadings * * * not on placards" (*id.* at 21a). Moreover, the court said, Congress may protect against the danger that the public will mistakenly believe a judge's decision to have been the result of popular pressure (*ibid.*).

---

[2] The district court ruled that appellees had not exhausted their administrative remedies (App. D, *infra*, 65a-68a). The government did not suggest this basis for decision to the district court and did not defend it in the court of appeals.

Nevertheless, the court of appeals declared that it "need not determine the extent to which these concerns are applicable to proceedings before the United States Supreme Court" because "these legitimate concerns are fully addressed by 18 U.S.C. 1507" (App. A, *infra*, 21a-22a). Section 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

The court noted (App. A, *infra*, 23a) that the constitutionality of a state statute modeled after the bill that became Section 1507 was upheld in *Cox* v. *Louisiana* (*Cox II*), 379 U.S. 559, 560-567 (1965). Because of Section 1507, the court of appeals said, it could find no justification for 40 U.S.C. 13k.

The court of appeals dismissed the argument that the need to protect the dignity and decorum of the Supreme Court justified Section 13k. The court questioned whether these interests could ever justify a regulation of expression (App. A, *infra*, 24a). The court then added that because "*all* expressive conduct outside the Supreme Court" could not be shown "adversely [to] affect the peace and decorum of the Court," the government's interest in promoting those objectives was not sufficient to sustain Section 13k (App. A, *infra*, 25a).

The court of appeals stated that it did not intend to "suggest that any individual may picket or leaflet in the Supreme Court building itself" (App. A, *infra*, 26a-27a). But it said that because of the "all-encompassing terms," the "decades of consistently broad enforcement," and the "slim legislative history" of Section 13k, it would not construe the statute more narrowly in order to avoid constitutional objections (App. A, *infra*, 28a-29a). The court concluded that because Section 13k "prohibits expressive conduct unrelated to any business of the Supreme Court throughout the Supreme Court grounds," it is "void on its face" (App. A, *infra*, 27a).

Judge MacKinnon dissented from this holding. He reasoned that the activities proscribed by Section 13k would, if permitted, "create the impression * * * in the public's mind that the Supreme Court is embroiled in or affected by such street pressures and picketing. Our tripartite government has a strong interest in sheltering its judicial branch from the appearance of influence by political forces and all outside pressures" (App. A, *infra*, 32a). Judge MacKinnon also questioned the majority's suggestion that the restriction imposed by Section 13k is excessive because it extends beyond matters pending before the Court, noting that "the subject[s] of on-going public campaigns and movements" are frequently "potential judicial issues" that are likely to come before the Court at some time (App. A, *infra*, 47a).

Three judges dissented from the court of appeals' denial of a petition for rehearing with a suggestion for rehearing en banc (App. C, *infra*, 53a-55a).

THE QUESTION IS SUBSTANTIAL

The First Amendment permits a content-neutral regulation that leaves open alternative means of expression and promotes substantial government interests. The narrow restriction imposed by 40 U.S.C. 13k is not based on the content of expression. In addition, Section 13k leaves open ample alternative means for appellees and others to express themselves; it permits demonstrations and leafleting directly across the street from the Court, a location that should be significantly less satisfactory only to those who are attempting to influence the Court—and who therefore, under *Cox II*, *supra*, have no right whatever to be near it. Finally, the court of appeals acknowledged the government's important interest in protecting against actions that might create the impression that the Supreme Court can be swayed by outpourings of popular sentiment.

Nevertheless, the court invalidated Section 13k because it assumed, incorrectly and without analysis, that the government's interest is fully protected by 18 U.S.C. 1507, a statute that prohibits only actions done with the intent of influencing the Court. Moreover, the court of appeals erred in denigrating the government's interest in preserving certain sites, such as the Supreme Court, as national monuments that serve purposes "basically incompatible with" the "manner of expression" in which appellees propose to engage (*Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972)). Because the court of appeals incorrectly reevaluated Congress' legitimate objectives and the efficacy of the means Congress chose to attain them, thus needlessly striking down an Act of Congress that imposes at most a slight restriction on expression, plenary review by this Court is warranted.

1. The Court has "'often approved restrictions [on expressive activities] * * * that * * * are justified without reference to the content of the regulated speech, that * * * serve a significant governmental interest, and that in doing so * * * leave open ample alternative channels for communication * * *.'" *Heffron* v. *International Society for Krishna Consciousness, Inc.*, No. 80-795 (June 22, 1981), slip op. 6-7, quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). See, *e.g.*, *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980); *Grayned* v. *City of Rockford*, *supra*. It is clear that Section 13k is a neutral regulation "'applicable to all speech *irrespective of content*'" (*Carey* v. *Brown*, 447 U.S. 455, 470 (1980), quoting and adding emphasis to *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975)). Section 13k bars all demonstrating and leafleting on the Supreme Court grounds, whatever the speaker's message. The Marshal of the Supreme Court stated in an affidavit filed in the district court that Section 13k "is enforced uniformly without regard to [the] message of the expressive conduct." Neither the district court nor the court of appeals found any evidence of discriminatory enforcement. Section 13k therefore presents no danger that "communication has * * * been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 536, quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

Moreover, Section 13k does not impose a significant burden on protected speech. Section 13k permits speakers to demonstrate anywhere in the vicinity of the Supreme Court except on the one square block

occupied by the Court itself, and in the Court building. Section 13k does not apply, for example, to leafleting and picketing across the street from the Court. The court of appeals assumed (see App. A, *infra*, 24a)—although appellees did not show—that speakers attract less attention across the street than they would on the Supreme Court grounds. But especially when a speaker is addressing a subject unrelated to the Court's business, there is no reason to believe that any diminution in the attention he receives by moving across the street is of constitutional significance. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, No. 80-608 (June 25, 1981), slip op. 3 (Brennan, J., concurring). In any event, the Court has made it clear that if the government imposes a content-neutral regulation on speech, the First Amendment requires only that it leave open "ample" alternative means of communication. A speaker has no absolute right to speak at the time or place, or in the manner, that attracts the largest audience or the most attention. See, *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, slip op. 13-14; *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966); *Cox* v. *Louisiana* (*Cox I*), 379 U.S. 536, 554-555 (1965).

A speaker who is demonstrating in an attempt to influence the Court may have a strong interest in being as close to the Court as possible. See *Carey* v. *Brown*, *supra*, 447 U.S. at 468-469 n.13. But as the court of appeals recognized, this interest does not merit constitutional protection, and 18 U.S.C. 1507 constitutionally prohibits such a speaker from being near the Court. *Cox II*, *supra*, 379 U.S. at 560-567. Other speakers who are not addressing the Court may consider its grounds the most appropriate symbolic

backdrop for their activities. Even from across the street, however, demonstrators will be able to take advantage of the connotations of proximity to the Court. Thus the court of appeals, while acknowledging that those with the strongest interest in demonstrating on the Supreme Court grounds may not do so, invalidated Section 13k in order to protect those who are not directly petitioning the Court, and whose only interest is in the somewhat greater attention they may attract, or in having a marginally more appropriate site for their demonstration. This is not a sufficient basis for striking down an Act of Congress. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*; *Adderley* v. *Florida*, *supra*.

2.a. The court of appeals acknowledged (App. A, *infra*, 20a-21a) that the government has unusually strong interests in regulating picketing and demonstrations near federal courts. Congress has an interest, first, in "protecting [the] judicial system from the pressures which picketing near a courthouse might create. * * * [A] legislature has the right to recognize the danger that some judges * * * and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms * * *." *Cox II*, *supra*, 379 U.S. at 562-565. Perhaps even more important, so far as Section 13k is concerned, is the government's interest in "protect[ing] the judicial process from being misjudged in the minds of the public" (*id.* at 565). A decision rendered shortly after a large and well-publicized demonstration on the issue involved may be perceived as a reaction to the demonstration; Congress "may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of

the judicial process" (*ibid.*). See *Greer* v. *Spock*, *supra*, 424 U.S. at 839 (government's interest in protecting against the appearance that the military is involved in politics justifies a restriction on expressive activities); *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 565 (1973) (interest in avoiding the appearance that government employees are influenced by politics justifies a restriction on expressive activities).

The court of appeals did not deny that Section 13k promotes these substantial interests. Rather, the court struck down Section 13k because, it asserted (App. A, *infra*, 22a), these interests were "fully addressed" by 18 U.S.C. 1507. Since the Constitution does not prohibit Congress from enacting two statutes that address the same problem in overlapping ways, the court of appeals must have meant that Section 13k was excessively restrictive because it, unlike Section 1507, was not limited to actions done "with the intent of influencing" the Court (see App. A, *infra*, 23a). But the court did not undertake to weigh the advantages and disadvantages of a specific intent requirement and did not adequately explain why Section 13k must be invalidated because it does not include such a requirement.

The intent requirement in Section 1507 is principally designed to protect such expression as "picketing to protest the actions of a[n] * * * official * * * completely unrelated to any judicial proceedings, who just happen[s] to have an office located in the courthouse building" (*Cox II*, *supra*, 379 U.S. at 567). Section 13k, however, applies only to the Supreme Court building, which houses only the Court and related offices. Thus the principal reason for an in-

tent requirement is simply inapplicable to Section 13k. The court of appeals also suggested that the "intent of influencing" requirement is needed so that Section 13k will not restrict demonstrations that are wholly unrelated to the Court's business, and that therefore do not implicate Congress' interest in preventing the real or perceived intimidation of the judiciary. But such demonstrations are likely to be relatively few in number, both because the Court deals with a wide range of issues of public importance and because those interested in demonstrating about matters unrelated to the Court's work are more likely to choose other sites in Washington. In addition, as we have said, persons involved in demonstrations not addressed to the Court's work have less of an interest in being on the Supreme Court grounds, and asking them to move across the street does not have a significant impact on their First Amendment rights.

At the same time, limiting Section 13k to demonstrations intended to influence the Court would have significant costs. It would inevitably increase the discretion of enforcement officers and juries, and would permit the content of a person's speech to be used against him, as evidence of his intentions (see *Cox II*, *supra*, 379 U.S. at 567); these consequences are surely undesirable, even though *Cox II* establishes that they do not make Section 1507 unconstitutional. Moreover, some demonstrations concerned with a political or social issue implicated by Supreme Court cases may be *seen* as influencing the Court—and therefore, under *Cox II*, are properly subject to regulation—even though it cannot be shown that the demonstrators *intended* to influence the Court. The court of appeals did not explain why, given this balance

of opposing interests, Congress violated the Constitution by not limiting Section 13k to demonstrations intended to influence the Court.

b. The government also has a substantial interest —not seriously considered by the court of appeals— in dedicating some of its property to symbolic uses inconsistent with public demonstrations. There can be no doubt of the government's power to establish monuments and memorials; similarly, public buildings and grounds can (and frequently do) serve symbolic, as well as practical, functions. The court of appeals failed to explain why Congress cannot treat the building and grounds of the nation's highest court as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, free from outside pressure and political controversy —and to determine that this symbolic mission is "basically incompatible with" public demonstrations (*Grayned* v. *City of Rockford, supra,* 408 U.S. at 116).[3]

It is well established that Congress or a state legislature may dedicate property to uses that do not permit expression of a certain form, or even a certain content. See, *e.g., Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) (prisons); *Greer* v. *Spock, supra* (military bases); *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974) (public transportation); *Grayned* v. *City of Rockford, supra,* 408 U.S. at 116 (libraries); *id.* at 117-121 (schools); *Adderley* v. *Florida, supra* (jail grounds). See also *United States Postal Service* v.

[3] The court of appeals repeatedly referred to Section 13k as a "total ban" on expression, which of course it is not; it does not, for example, prohibit private discussions among persons properly on the Court grounds.

Council of Greenburgh Civic Associations, supra, slip op. 14-19; *Heffron* v. *International Society for Krishna Consciousness, Inc., supra*, slip op. 6-10. In these cases, the government's interests in regulating expression were arguably more tangible than Congress' interest in preserving the symbolic value of certain public areas and buildings; but just as esthetic interests can justify restrictions on speech (*Metromedia, Inc.* v. *City of San Diego*, No. 80-195 (July 2, 1981), slip op. 16, 18 (plurality opinion)), there can be little doubt that Congress may make the "necessarily subjective" (*id.* at 18) judgment that in order to serve symbolic and other intangible public purposes, certain monuments and areas require a serenity and decorum that cannot accommodate public demonstrations.[4]

There is no reason to deny Congess the power to treat the nation's highest court in this fashion. A different question would be presented if Congress used its power to preserve symbols and create monuments in such a way that First Amendment rights were seriously impaired; but as we have explained, Section 13k constitutes, at most, a minimal restriction on expression. Similarly, *Cox II, supra*, establishes that, for First Amendment purposes, courthouse grounds are not comparable to areas like "streets and parks[,] * * * [which] immemorially * * * have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)), and where the government's power to limit expression is therefore more

[4] It seems unlikely, for example, that the Constitution requires Congress to permit demonstrations in national cemeteries.

circumscribed (see, *e.g.*, *Carey* v. *Brown*, *supra*, 447 U.S. at 460; *Hudgens* v. *NLRB*, 424 U.S. 507, 515 (1976); see also *A Quaker Action Group* v. *Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975) (White House area is a "unique situs" for the exercise of First Amendment rights)). Indeed, the Supreme Court building and grounds are a uniquely appropriate symbol of the "calmness and solemnity of the courtroom" and of the judicial process (*Cox II*, *supra*, 379 U.S. at 583 (opinion of Black, J.)). See *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C.) (three-judge court), aff'd, 409 U.S. 972 (1972) (demonstrations on Capitol grounds are permissible although similar demonstrations near a courthouse are not, because Congress, unlike a court, is appropriately subject to public opinion). The court of appeals did not adequately consider this significant legitimate interest promoted by Section 13k.

3. Because this case concerns the constitutionality of a statute that applies only to the Supreme Court building and grounds, and is enforced by an officer appointed by the Court, the question arises whether the members of this Court are disqualified from considering the matter. Although the situation of the Chief Justice may present special concerns because he was named as a party in the proceedings below, we know of no sufficient reason for the other members of the Court to disqualify themselves, either under the mandatory criteria of 28 U.S.C. 455(b) or because their "impartiality might reasonably be questioned" (28 U.S.C. 455(a)). In addition, if all the members of the Court are disqualified, the judgment below—which declared an act of Congress unconstitutional on its face—apparently must be affirmed.

28 U.S.C. 2109; see *Sloan* v. *Nixon*, 419 U.S. 958 (1974); *Prichard* v. *United States*, 339 U.S. 974 (1950). Congress enacted 28 U.S.C. 1252, the statute under which this Court's jurisdiction is invoked, because it recognized "[t]he importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress * * *." H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937). Because review by this Court is therefore "especially important in th[is] case[]" (*United States* v. *Will*, 449 U.S. 200, 217 (1980)), we believe that any doubts should be resolved against disqualification.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MARC RICHMAN
KAREN CZAPANSKIY
Attorneys

APRIL 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2044

MARY TERESE GRACE
THADDEUS ZYWICKI, APPELLANTS

v.

WARREN E. BURGER,
CHIEF JUSTICE OF THE
UNITED STATES SUPREME COURT, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 80-01205)

Argued May 27, 1981

Decided September 8, 1981

Before: MACKINNON, EDWARDS and GINSBURG, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* EDWARDS.

Separate statement by *Circuit Judge* MACKINNON, dissenting in part and concurring in part.

EDWARDS, *Circuit Judge*: In this case, appellants challenge the constitutionality of 40 U.S.C. § 13k, which declares:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

40 U.S.C. § 13k (1976).[1] As interpreted and applied by the Marshal of the Supreme Court, the individual responsible for the enforcement of the statute, section 13k prohibits all expressive conduct, including all picketing and leafletting, on the Supreme Court grounds.[2]

For the reasons set forth below, we find that this statute is repugnant to the First Amendment of the Constitution. While public expression that has an intent to influence the administration of justice may be restricted, *Cox* v. *Louisiana*, 379 U.S. 559 (1965), Congress has accomplished that result with a more narrowly drawn statute, 18 U.S.C. § 1507, that is fully applicable to the Supreme Court grounds. Since we are unable to find any other significant governmental interest to justify the *absolute* prohibition of *all* expressive conduct contained in section 13k, we hold that the statute is unconstitutional and void. As a result, appellants are entitled to the declaratory and injunctive relief that they seek.

---

[1] The Supreme Court grounds extend to the curb of each of the four streets that enclose the block on which the Supreme Court building is located. *See* 40 U.S.C. § 13p (1976).

[2] Affidavit of Alfred Wong, Marshal of the Supreme Court, Record ("R.") 3, Defendant's Exhibit 1. Indeed, at oral argument before this panel, Government counsel virtually conceded that even expressive T-shirts or buttons worn on the Supreme Court grounds would be prohibited by § 13k.

I. BACKGROUND

The facts of this case are not in dispute.[3] In May 1978, appellant Thaddeus Zywicki, an elderly Catholic missionary, went by himself to the sidewalk in front of the Supreme Court to distribute a leaflet to passersby. Standing near a coin-operated vending machine selling the *Washington Star*, appellant attempted to distribute a reprint of a "letter to the editor" published in the *Washington Post* concerning the removal of unfit judges from the federal bench. After distributing a few leaflets, appellant was approached by a member of the Supreme Court police, who advised appellant that Title 40 of the United States Code prohibited leafletting anywhere on the Supreme Court grounds. Fearing arrest, appellant departed.

On January 8, 1980, appellant Zywicki returned to the Supreme Court sidewalk to distribute pamphlets that contained an invitation to, and information about, several religious meetings concerning oppressed peoples of Central America. As before, appellant was told that he would be arrested if he continued to distribute the leaflets.

On February 4, 1980, appellant again returned to leaflet. On this occasion, however, Zywicki informed the police officer that a decision of the District of Columbia Superior Court had narrowed the application of 40 U.S.C. § 13k to prohibit only conduct engaged in "with the intent to disrupt or interfere with or impede the administration of justice or with the

---

[3] Both the Government, in its motion for summary judgment, and the District Court, in its Memorandum Opinion, accepted the factual allegations of appellants' complaint. See R. 3, 8.

intent of influencing the administration of justice." [4] The officer radioed a person inside the Supreme Court building for clarification, and a Mr. White emerged and stated that the statute had not been changed and that appellant was subject to arrest for leafletting on the sidewalk. Appellant protested that newspapers were permitted to be sold while he was denied the right to distribute printed matter of his choosing, but peacefully left the grounds.

Upon learning of these events, appellant Mary Grace appeared on the sidewalk in front of the Supreme Court on March 17, 1980, and stood there alone with a sign that recited verbatim the words of the First Amendment. Shortly after her arrival, a Supreme Court police officer approached appellant and told her that her conduct violated Title 40 of the United States Code. The officer advised appellant that, unless she left the grounds, she would have to accompany the officer into the building. Fearing arrest, appellant Grace left.

On May 13, 1980, appellants Zywicki and Grace filed a complaint in the District Court seeking a declaratory judgment that 40 U.S.C. § 13k is unconstitutional on its face, and a permanent injunction prohibiting the Supreme Court police from enforcing the statute. Both parties filed motions for summary judgment on the merits of this controversy. On August 7, 1980, however, the District Court dismissed appellants' complaint for failure to exhaust administrative remedies. R. 8 (Memorandum Opinion). This ground for dismissal had not been briefed or argued by either party in the District Court.

---

[4] *United States* v. *Ebner*, No. 12487-79, transcript of proceedings at 39, 41 (D.C. Super. Ct. Jan. 22, 1980) (Hannon, J.).

In this appeal, appellants contend that the dismissal of the complaint for failure to exhaust administrative remedies was improper. Appellants also seek a judgment from this court declaring 40 U.S.C. § 13k void on its face, and an injunction prohibiting further enforcement of section 13k.[5] In response, although seeking an affirmance, the Government does not advance the exhaustion of administrative remedies reasoning relied upon by the District Court. Rather, the Government contends that the complaint was properly dismissed because section 13k is a proper limitation of expressive conduct on the grounds of the Supreme Court.

II. Exhaustion of Administrative Remedies

The District Court dismissed this action on the ground that appellants failed to apply to the Supreme Court Marshal for a permit to engage in the conduct for which they now seek judicial protection. Given the circumstances of this case, the judgment of the District Court was plainly erroneous. We hold that appellants' complaint should not have been dismissed for failure to secure a permit or for failure to otherwise pursue some ill-defined administrative remedy.

The statutory scheme at issue here makes no provision for obtaining a permit to leaflet or picket on the Supreme Court grounds. Section 13k flatly prohibits all expressive conduct on the Court grounds, not

---

[5] We note that appellants have standing to maintain this action. Appellants have attempted to engage in expressive conduct on the Supreme Court grounds, and have been prevented from doing so by § 13k. In addition, both appellants "are eager to exercise their First Amendment rights at the Supreme Court and both would return but for the spectre of arrest." Complaint ¶ 27, R. 1.

merely expressive conduct engaged in without a permit or license. *Compare, e.g., Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). Furthermore, no administrative procedures have been established by which persons may obtain permission to leaflet or picket on Supreme Court grounds.[6]

Most importantly, the Government has conceded in this case that all expressive conduct—without exception—is forbidden on Court grounds. The Supreme Court police officers who approached appellants did not indicate that appellants' conduct might be permitted if prior approval from the Marshal were obtained. In addition, the Marshal's affidavit to the District Court makes it absolutely plain that *no* expressive conduct will be permitted on the grounds of the Supreme Court.[7] Thus, so far as the Govern-

---

[6] Another section of the statute, 40 U.S.C. § 13*l* (1976), provides that, "[*i*]*n addition to the restrictions and requirements specified in sections* [*13g-13k*], the Marshal of the Supreme Court may prescribe such regulations . . . as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds." (Emphasis supplied.) This authorization is clearly designed to supplement the requirements contained in the statute challenged here. It does not afford the Marshal leeway to modify the total prohibition on expressive activity contained in § 13k. The only regulations promulgated pursuant to this section, moreover, concern the hours during which the Supreme Court Building is open to the public. R. 7.

[7] As stated in the affidavit of Alfred Wong, Marshal of the Supreme Court:

> When any person on the grounds of the Supreme Court of the United States engages in expressive conduct, including carrying a sign, passing out leaflets or partici-

ment is concerned, section 13k does not contemplate or require any permit or licensing procedure for expressive conduct on Court grounds.

In these circumstances, dismissal of the complaint for failure to exhaust administrative remedies was without justification. No administrative remedies existed for appellants to exhaust. While appellants conceivably could have sought formal permission from the Supreme Court Marshal, such action would have been an empty—and thus unnecessary—ritual. As stated by Chief Judge Robinson in *Lodge 1858, American Federation of Government Employees* v. *Paine*, 436 F.2d 882 (D.C. Cir. 1970), "the exhaustion requirement contemplates an efficacious administrative remedy, and does not obtain when it is plain that any effort to meet it would come to no more than an exercise in futility." 436 F.2d at 896 (separate opinion).

The mere fact that the position of Marshal exists, and that the person in that position may possess the power to withhold enforcement of section 13k, does not mean that an "efficacious administrative remedy" was available to appellants. The statute sets forth no criteria under which the Marshal could determine whether to grant or deny an application for permission to leaflet or picket. This alone would call into question the judgment of the District Court. As the

---

pating in a demonstration, that person is notified by a law enforcement officer that the conduct is in violation of 40 U.S.C. § 13(k) and advised that unless they cease the conduct or leave the grounds of the Supreme Court of the United States they will be arrested. The person is then given a reasonable time to desist his or her conduct or leave the grounds. Those who do not cease their conduct or leave the grounds are arrested.

R. 3, Defendant's Exhibit 1.

Supreme Court has held, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definitive standards to guide the licensing authority, is unconstitutional," *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969); moreover, the Court also noted that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151. *See also Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).[8]

For all of the foregoing reasons, we reject the decision of the District Court dismissing appellants' complaint for failure to secure a permit or otherwise to exhaust an administrative remedy.

III. The Constitutionality of 40 U.S.C. § 13k

The Government contends that the District Court was correct in dismissing appellants' complaint, since the prohibition of expressive conduct contained in section 13k does not unduly interfere with First Amendment rights of free speech. Appellants strongly dispute this contention, and assert that section 13k is unconstitutional on its face. We turn to consider this significant question of constitutional law.[9]

---

[8] *But see Walker* v. *City of Birmingham*, 388 U.S. 307 (1967) (petitioners not entitled to ignore an overly broad and vague *ex parte* temporary injunction); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953) (petitioners not entitled to ignore an arbitrary and unreasonable denial of a permit under an otherwise valid licensing scheme.) Neither of these decisions is applicable in the instant case.

[9] As a result of its disposition below, the District Court did not address this question. While "[i]t is the general rule,

A. *Freedom of Expression in Public Places*

Cases concerning the rights of individuals to express opinions or air grievances on public property are among the most important in our jurisprudence. In countless cases heard over the years, the Supreme Court has strived to reconcile the clear directive of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech" [10] with

---

of course, that a federal appellate court does not consider an issue not passed upon below," *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976), "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below." *Id.*

We believe that this is such a case. Both parties have addressed fully the constitutionality of § 13k, both in this court and in the District Court. This is not a case, therefore, where resolution of an issue for the first time on appeal would cause undue surprise or prejudice. *Accord, Charles* v. *Carey*, 627 F.2d 772, 790 n.32 (7th Cir. 1980). In addition, since appellants challenge the constitutionality of § 13k on its face, the resolution of this issue is purely one of law, appropriate for appellate review. *See United States* v. *Black*, 609 F.2d 1330, 1333 (9th Cir. 1979), *cert. denied*, 101 S.Ct. 132 (1980) ("But when the issue [not considered] in the trial court is purely one of law and the pertinent record has been fully developed, the court of appeals may consider it, particularly when as here the issues have been fully briefed.") For these reasons, we believe that a remand to the District Court, which inevitably would result in a future appeal to this court, "would be a waste of judicial resources." *United States* v. *Aulet*, 618 F.2d 182, 186 (2d Cir. 1980).

[10] This directive has been made applicable to the actions of the States, as well as Congress, by the Fourteenth Amendment. *See Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963), and cases cited.

legitimate needs of the Government to limit expression on certain public property so that governmental functions may be conducted safely and properly. In certain of these cases the Court has recognized a broad right of access to public property for purposes of free expression, while in others the Court has been more restrictive of First Amendment freedoms. We first address these divergent groups of cases and set forth an overall method of analysis that may be gleaned from the decisions of the Court.

1. *Cases Establishing Broad Rights of Access*

The Supreme Court has long recognized the importance of access to public places for purposes of free speech. In *Hague* v. *CIO*, 307 U.S. 496 (1939), the Court declared unconstitutional a local ordinance that prohibited "public parades or public assembly in or upon the public streets, highways, public parks or public buildings" without a permit from a local official, which permit could be refused "for the purpose of preventing riots, disturbances or disorderly assemblage." 307 U.S. at 502 n.1. In words at times considered the cornerstone for determining the rights of individuals to use public streets and parks for the expression of political or religious views,[11] Justice Roberts stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and

[11] *See Kunz* v. *New York*, 340 U.S. 290, 293 (1951); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972).

> public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515 (plurality opinion). Since the ordinance could be used as "the instrument of arbitrary suppression of free expression of views on national affairs," *id.* at 516, the Court declared the law "void upon its face." *Id.*

The right to use public property for free expression has been expanded beyond public sidewalks and parks. In *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the Supreme Court reversed breach of peace convictions of 187 Black high school and college students who had conducted an orderly demonstration on the South Carolina State House grounds. During their demonstration, the students had walked —single file or two abreast—carrying placards with messages such as "I am proud to be a Negro" and "Down with segregation." 372 U.S. at 231. The students had assembled on the State House grounds, which housed the Executive, Legislative and Judicial branches of the South Carolina Government, to express their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina." *Id.* at 235. The Supreme Court held that, in arresting, convicting, and sentencing the students, the State had infringed constitutionally protected rights of free speech, free assembly, and freedom to petition the Government for the redress of grievances. The Court stated that "[t]he circumstances in this case reflects an exercise of these basic constitutional rights in their most pristine and classic form." *Id.*

Following *Edwards* v. *South Carolina*, other cases of the Court have reenforced and further established

rights of expression on public property. In *Brown* v. *Louisiana*, 383 U.S. 131 (1966), the Supreme Court vacated the convictions of five individuals found to have violated a breach of peace statute by conducting a peaceful and silent "sit-in" in the reading room of a public library.[12] Although the Court held that the evidence did not support a violation of the breach of peace statute, four Justices of the majority also stated that the protestors' actions were protected by the First Amendment.[13] Similarly, in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court declared that the First Amendment protected the right of school children to wear black armbands in school in protest against the Vietnam War. Subsequetly, in *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd mem.*, 409 U.S. 972 (1972), the Court affirmed, without opinion, a decision of a three-judge District Court declaring unconstitutional an Act of Congress that prohibited processions or assemblages on the United States Capitol grounds.[14]

Thus, First Amendment rights of expression have been found to exist in public streets and parks, on

---

[12] To protest the segregation of the library, five Blacks silently sat or stood for 10 to 15 minutes in a branch library that served only white persons. 383 U.S. at 139.

[13] *See* 383 U.S. at 142 (plurality opinion), and at 146 (Brennan, J., concurring).

[14] *See also A Quaker Action Group* v. *Morton* (*Quaker Action IV*), 516 F.2d 717 (D.C. Cir. 1975) (vacating, on First Amendment grounds, regulations of the National Park Service that limited demonstrations on the sidewalk in front of the White House to 100 persons and demonstrations in Lafayette Park across the street to 500 persons).

State House and the United States Capitol grounds, on the sidewalk in front of the White House, in public schools, and, by four Justices of the majority in *Brown* v. *Louisiana*, in the reading room of a public library. In these diverse situations, it has been held that the State may not impose a complete prohibition on the use of public property as a forum in which individuals may share ideas or express grievances against the Government.

2. *Cases Restricting First Amendment Activity*

The Supreme Court also has held that rights of expression on public property are not absolute. In the landmark decision of *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), the Court unanimously upheld the constitutionality of a statute that prohibited a parade or procession on public streets without a license, since the statute, as construed, conveyed authority only to take into account "considerations of time, place and manner so as to conserve the public convenience." 312 U.S. at 575-76. The Court noted that this limited control over the time and place of expression served to afford the opportunity for proper policing, and to prevent the confusion that could result from overlapping parades or processions. *Id.* at 576.[15] The

[15] The Court also explained:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

312 U.S. at 574.

legacy of *Cox* v. *New Hampshire* has remained. Indeed, the Supreme Court recently reaffirmed that activities protected by the First Amendment "are subject to reasonable time, place, and manner restrictions." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762, 4764 (June 22, 1981).

In certain situations, the Supreme Court has upheld relatively substantial restrictions on the right to use public property for expressive activity. In *Cox* v. *Louisiana*, 379 U.S. 559 (1965), the Supreme Court considered the constitutionality of a state statute that provided:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.

379 U.S. at 560. Although the Supreme Court ruled that the State was "estopped" from invoking the statute, *id.* at 571, the Court also held "that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Id.* at 564.

At issue in *Cox* v. *Louisiana* was a demonstration of 2,000 persons, gathered across the street from the courthouse, 101 feet from its steps. A major purpose of the demonstration was to protest what was considered to be an illegal arrest of 23 students who

were detained in the courthouse building. *Id.* at 566. The Supreme Court noted that "[t]here can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create," *id.* at 562, and concluded:

> A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. A narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate to vindicate the State's interest in assuring justice under law.

Id. The Court made clear, however, that critical to its decision was the fact that the statute was drawn narrowly to apply only to picketing with an intent to interfere with the administration of justice. As stated by the Court:

> Absent an appropriately drawn and applicable statute, entirely different considerations would apply if, for example, the demonstrators were picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building.

Id. at 567.

Soon after the decision in *Cox* v. *Louisiana*, the Court handed down *Adderley* v. *Florida*, 385 U.S. 39 (1966), affirming the convictions of 32 persons found to have violated a state trespass statute by conducting a demonstration on jailhouse grounds. The demonstrators in *Adderley* had entered the jail grounds through a driveway used only for purposes related to jailhouse business, without warning to,

or permission from, the sheriff. In reviewing the case, the Court noted that jails, built for security purposes, are not traditionally open to the public, and emphasized that:

> This particular jail entrance and driveway were not normally used by the public, but by the sheriff's department for transporting prisoners to and from the courts several blocks away and by commercial concerns for servicing the jail. Even after their partial retreat, the demonstrators continued to block vehicular passage over this driveway up to the entrance of the jail.

Id. at 45. Noting that the sheriff objected only to the presence of the demonstrators "on that part of the jail grounds reserved for jail uses," *id.* at 47, the Court affirmed the convictions. In these circumstances, the Court held that the State "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*

Relying in part on *Adderley*, a recent line of cases have held that, on public property not properly designated as a "public forum," the State may significantly restrict free expression. In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld a municipal decision not to accept paid political advertising for its mass transit system advertising space, noting that the decision was made "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." 418 U.S. at 304. Similarly, in *Greer* v. *Spock*, 424 U.S. 828 (1976), relying on both "the historically unquestioned power of [a military] commanding officer summarily to exclude civilians from the area of his command," *id.* at 838 (*quoting Cafeteria Workers* v. *McElroy*, 367 U.S.

886, 893 (1961)), and "the American constitutional tradition of a politically neutral military establishment under civilan control," *id.* at 839, the Supreme Court held that a regulation prohibiting all political speeches on a federal military base did not violate the First Amendment. Most recently, relying on "[t]he interest in preserving order and authority in the prisons," the Court, in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977), upheld regulations promulgated by the North Carolina Department of Correction that prohibited inmates from soliciting other inmates to join a prisoners' union, barred all meetings of the union, and denied bulk mailing privileges to union publications.

3. *Analyzing Cases Concerning Freedom Of Expression On Public Property*

Unfortunately, even upon careful and extended review, it is difficult to discern a unifying thread of analysis that binds the Supreme Court decisions concerning freedom of expression on public property.

In at least a handful of cases, the Court has determined that certain public facilities were not public forums;" in these cases, it appears that the challenged restrictions on freedom of expression have been subjected to a low level of scrutiny by the Court. For example, in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), the Court stated that, since a prison is not a public forum, prison authorities "need only demonstrate a rational basis for their distinctions between organizational groups." 433 U.S. at 134. Similarly, in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), a plurality of the Court stated that "the policies and practices governing access to the

transit system's advertising space must not be arbitrary, capricious, or invidious." 418 U.S. at 303.

These judicial statements seem at odds with the general principle that governmental restrictions of free speech will be upheld only upon a showing that the restriction is essential to the furtherance of a substantial governmental interest. As stated in *United States* v. *O'Brien*, 391 U.S. 367 (1968), a governmental restriction of free speech

> is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. Very recently, in *Heffron* v. *International Society of Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (June 22, 1981), the Supreme Court reaffirmed, without qualification, that "[a] valid time, place, and manner regulation [of First Amendment activities] must also 'serve a significant governmental interest.'" 49 U.S.L.W. at 4764 (*quoting Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 771 (1976)).

Although some aberrations seemingly do appear, upon close examination we do not find these various opinions of the Supreme Court to be essentially inconsistent. It is true that the Supreme Court has suggested in the so-called "non-public forum" cases that a lesser degree of scrutiny may be applicable; however, the determination that a public facility is not a "public forum" has been accompanied in each of these cases by an expression of important governmental interests

justifying the State to preserve the property for the use to which it was lawfully dedicated. Military bases, for instance, are established solely to train soldiers and defend the nation, and require, for the successful accomplishment of those objectives, a large degree of discipline, order and restrictions on civilian access. Prisons are established solely to house and rehabilitate those convicted of crime, and require, in order to maintain security and order, extensive restrictions on individual freedom and autonomy. These facilities possess, by their very nature, peculiar characteristics that entitle the State to impose greater restrictions on expression than would be allowed for public sidewalks or parks. Even in cases involving these facilities, however, the Supreme Court has noted that First Amendment privileges remain that are not inconsistent with the State's legitimate use of the property. As recognized in *Jones*, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." 433 U.S. at 125 (*quoting Pell* v. *Procunier*, 417 U.S. 817, 822 (1974)).

Thus, we believe that the decisions of the Supreme Court dictate that whenever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest—whether that interest derives from the very nature of the property itself, or from some other source. Moreover, the restriction on freedom of expression can be no greater "than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Certainly, even peaceful expression may be prohibited "when it interferes with the operation of vital governmental facilities," *Carey* v. *Brown*, 447 U.S. 455, 470 (1980); the

State retains the power "to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966). As perhaps best stated in *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972), "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

With these principles in mind, we turn to consider the present case.

B. *Freedom of Expression and the Supreme Court Grounds*

In this case, we are concerned with a statute that, as construed, prohibits all expressive conduct in the Supreme Court building and on the Supreme Court grounds. The statutory prohibition applies whether or not the message conveyed concerns any matter pending before the Court; public expression is also banned no matter what effect is intended or produced by the message. The statute applies whether or not the Court is in session, and extends to the broad sidewalks that surround the Supreme Court building, which are at all times of the day and night open to the public. Indeed, the statute, on its face, conceivably prohibits the wearing of an expressive T-shirt or button declaring "I love America" on the sidewalk in front of the Supreme Court building at 10 o'clock at night. Thus, we are not concerned with a narrow regulation that governs the time, place and manner of expression, or solely protects the efficient functioning of the physical structure. The statute, as construed, flatly prohibits all expressive conduct.

Substantial governmental interests certainly exist to justify restrictions on picketing and other forms of expression in and near courthouses. The constitutional

safeguards of due process that attend judicial proceedings in this country leave no room for influence or domination of the judiciary by public pressure; arguments to courts properly are presented in official pleadings, briefs and memoranda, not on placards. Although "[j]udges are supposed to be men [and women] of fortitude, able to thrive in a hardy climate," *Craig* v. *Harney*, 331 U.S. 367, 376 (1947), the Supreme Court has recognized that "judges are human; and the legislature has the right to recognize the danger that some judges . . . will be consciously or unconsciously influenced by demonstrations in or near their courtrooms." *Cox* v. *Louisiana*, 379 U.S. 559, 565 (1965).

Along with these considerations, "[a] State may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* Due to the possibility that a court may adopt, coincidentally, a position forcefully urged by courthouse demonstrators, "[a] State may protect against the possibility of a conclusion by the public . . . that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Id.*

We need not determine the extent to which these concerns are applicable to proceedings before the United States Supreme Court. As described above, the statute at issue is in no way limited to expression that may risk influencing a Supreme Court Justice, or, probably more realistically, that may distort public perceptions of Supreme Court decisionmaking.[16] Indeed, the legis-

---

[16] In upholding the statute at issue in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), the Supreme Court emphasized that the statute was "a precise, narrowly drawn regulatory statute which proscribes certain specific behavior." 379 U.S. at 562. As stated above, the Court noted that, "[a]bsent an appropri-

lative history of section 13k demonstrates no particularized congressional concerns with either the fair administration of justice or public confidence in the judicial process.[17]

More importantly, however, these legitimate concerns are fully addressed by 18 U.S.C. § 1507, which provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or use by such judge, juror, witness, or court offi-

---

ately drawn and applicable statute, entirely different considerations would apply if, for example, the demonstrators were picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building." *Id.* at 567.

[17] The Senate and House Reports accompanying what is now 40 U.S.C. § 13k are both very brief. In relevant part, the House Report simply provides:

> It is the belief of the Committee on the Judiciary that in keeping with the dignity of the highest Court in the land, provision should be made for the policing of its building and grounds similar to that which is made for the United States Capitol.

H.R. REP. No. 814, 81st Cong., 1st Sess. 2 (1949). Similarly, the Senate Report provides:

> In keeping with the dignity which should surround the Supreme Court of the United States and the building and grounds which house it, the committee feel that this legislation should be enacted promptly.

S. REP. No. 719, 81st Cong., 1st Sess. 2 (1949).

> cer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1507 (1976). The constitutionality of a state statute modeled on section 1507 was upheld by the Supreme Court in *Cox* v. *Louisiana*, *supra*. Section 1507 prohibits expressive conduct on the Supreme Court grounds designed to influence Supreme Court Justices or to interfere with the administration of justice; therefore, we can find no justification for the *absolute* prohibition of all expressive conduct contained in 40 U.S.C. § 13k.

The Government argues, however, that the absolute ban on expressive conduct contained in section 13k is necessary and appropriate to maintain the dignity and decorum of the Supreme Court. Indeed, it would appear that this is the sole justification of the statute advanced in the legislative history.[18] Although this interest admittedly is not protected in explicit terms by 18 U.S.C. § 1507,[19] we do not believe that this concern alone is sufficient to justify the absolute prohibition of free expression contained in this statute.

In *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd mem.*, 409

---

[18] *See* note 17, *supra*. *See also* 95 Cong. Rec. 8962 (1949) (Remarks of Rep. Celler): "[A]ll this bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself—no more and no less."

[19] However, it is arguable that any law designed to protect against interferences with the administration of justice will help maintain the dignity and decorum of the Court.

U.S. 972 (1972), a three-judge District Court considered a similarly worded statute prohibiting all parading or picketing on the United States Capitol grounds. In declaring the law unconstitutional on its face, the court explicitly rejected an argument that "the 'peace,' 'serenity,' 'majesty,' maintenance of a 'park-like setting,' and the 'glorification of a form of government through visual enhancement of its public buildings,'" justified an exclusion of all public expression on the Capitol grounds. 342 F. Supp at 585. The court unequivocally stated, "[t]he desire of Congress, if such there be, to function in the 'serenity' of a 'park-like setting' is fundamentally at odds with the principles of the First Amendment." *Id.*

Unquestionably, the majesty of the Supreme Court building can and does instill public confidence in the important governmental functions conducted inside. However, while the Capitol and Supreme Court buildings house different governmental entities, justifying different restriction on free expression, we believe that an interest in "the glorification of a form of government through visual enhancement of its public buildings" can no more justify an *absolute prohibition* of free expression on the Supreme Court grounds than on the grounds of the United States Capitol. The sight of a sole picketer may indeed mar an otherwise pristine morning or perfectly centered snapshot. However, it is just that annoyance—if such be the case—that may cause bystanders or passersby to stop and take notice, to become aware of an issue, to formulate a response to a companion. This awareness and interchange is, in part, precisely what the First Amendment is designed to protect.

An interest in the "peace" and "decorum" of the Supreme Court cannot alone justify the absolute abridgement of expressive conduct of section 13k.

Indeed, the Government cannot fairly assert that *all* expressive conduct outside the Supreme Court will adversely affect the peace and decorum of the Court. Thus, even if the asserted interest is legitimate by itself, it cannot justify the total ban at issue here.

We simply do not believe that all expressive conduct "interferes with the operation of [this] vital governmental facilit[y]." *Carey* v. *Brown*, 447 U.S. 455, 470 (1980). Unlike the situation presented in *Adderley* v. *Florida*, 385 U.S. 39 (1966), where over 100 demonstrators blocked vehicular passage over a jail driveway "not normally used by the public, but by the sheriff's department for transporting prisoners to and from the courts several blocks away and by commercial concerns for servicing the jail," *id.* at 45, the prohibition at issue here is not necessary for the Government "to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47. The Government has offered nothing to suggest that all expressive conduct on the sidewalk of the Supreme Court "is basically incompatible with the normal activity of [that] particular place at [that] particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972).

Nor is it sufficient, as the Government suggests, that other nearby locations exist where freedom of expression is not abridged. As the Supreme Court flatly declared in *Schneider* v. *State*, 308 U.S. 147 (1939):

> [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

308 U.S. at 163. Indeed, "[f]reedom of expression would not truly exist if the right could be exercised

only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969).[20]

In short, we find no interest to justify the absolute prohibition of expression contained in section 13k. Indeed, we believe that it would be tragic if the grounds of the Supreme Court, unquestionably the greatest protector of First Amendment rights, stood as an island of silence in which those rights could never be exercised in any form.

We emphasize that expressive conduct designed to disrupt the Supreme Court or to in any way influence the administration of justice is not protected by our opinion today. Such conduct is properly prohibited by 18 U.S.C. § 1507. Nor do we suggest that any individual may picket or leaflet in the Supreme

---

[20] This principle has not been changed by the recent decision in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (June 22, 1981), in which the Supreme Court held that, in order to maintain the orderly movement of the crowd through the large number of exhibits of a state fair, a State may require a religious organization to distribute and sell religious literature and solicit donations only at a designated booth located within the fairgrounds. The Court refused to separate, for constitutional purposes, "the open areas of the fairgrounds from that part of the fairgrounds where the booths are located." 49 U.S.L.W. at 4766 n.16. The Court was careful to state:

> Since respondents are permitted to solicit funds and distribute and sell literature from within the fairgrounds, albeit from a fixed location, it is inaccurate to say that Rule 6.05 constitutes a ban on such protected activity in the relevant public forum.

Id. The statute at issue in this case does not merely limit the area of the Supreme Court grounds available for expressive conduct; instead, the statute absolutely prohibits all expressive conduct throughout the grounds.

Court building itself. The statute at issue, however, prohibits expressive conduct unrelated to any business of the Supreme Court, throughout the Supreme Court grounds. Since such a blanket prohibition is inconsistent with the principles of the First Amendment, the statute is void on its face.

In so holding, we need not examine the facts of the present case to determine whether the particular conduct engaged in by appellants is protected by the First Amendment. As the Supreme Court recently stated in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980):

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.

444 U.S. at 634.[21] We have held that the absolute prohibition of section 13k, which prohibits expressive conduct unrelated to any business of the Supreme Court throughout the Supreme Court grounds, unduly abridges First Amendment rights. Thus, while on the record before us appellants' conduct would appear to be unrelated to any business of the Court and protected by the First Amendment, we need not so determine. Since the statute is not narrowly drawn to further a legitimate State interest, appellants are entitled to the relief that they seek.

In an effort to save section 13k with a narrowing construction, the dissenting opinion suggests that "the section should be limited . . . to prevent ex-

---

[21] While this principle is inapplicable in certain commercial speech cases, *see Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), that limitation is not relevant here.

pressive conduct aimed at promoting and propagandizing political parties and the various causes that are supported by the many movements extant in our pluralistic society." Dissenting op. at 6. It is unclear, however, to what extent, if any, that construction would operate at less than an absolute prohibition. The dissenting opinion ultimately construes "political parties," "organizations," "movements," and "causes" in such a way as to encompass virtually all expressive conduct. Thus, we cannot discern in the dissent's view of section 13k any comprehensible departure from the Government's construction of the statute, *i.e.*, it would ban all expressive conduct at all times and on all of the public grounds surrounding the Supreme Court.[22]

While we would prefer to adopt a narrowing construction of the statute in order to avoid a holding that section 13k is unconstitutional, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), a validating construction is simply impossible here. Section 13k's slim legislative history suggests only the desire on the part of Congress to surround the Court with the same cordon of silence that Congress attempted to place around the Capitol, *see* notes 17 and 18 *supra*, a measure struck down on First Amendment grounds in *Jean-*

---

[22] To the extent that the dissenting opinion's construction would actually limit the statute's reach, it would likely raise other potential constitutional infirmities. The prohibition of expressive conduct in support of various "movements" and "causes" is arguably both unconstitutionally vague, *see Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 621-22 (1976) (ordinance limiting canvassing and solicitation for a "political campaign or cause" invalid for vagueness), and unconstitutionally selective, *see Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98-99 (1972) (ordinance regulating picketing based on subject matter invalid).

nette Rankin Brigade v. *Chief of Police*, 342 F. Supp. 575 (D.D.C.) (three-judge court), *aff'd mem.*, 409 U.S. 972 (1972). Combined with the statute's all-encompassing terms and with decades of consistently broad enforcement, this legislative history precludes a limiting interpretation. G. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES §§ 178-180 (1888). Indeed, the Government concedes that section 13k is a *total ban* of all expressive conduct on the grounds surrounding the Supreme Court. Congress, of course, may legislate to narrowly restrict expressive conduct on the Supreme Court grounds that threatens significant governmental interests, but the creation of new statutes must be left to that body. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515-17 (1964).

In the end analysis, we simply cannot agree with our dissenting colleague that the interests in order and decorum can, consistently with the First Amendment, justify a total prohibition of all expressive conduct at all times and on all of the Supreme Court grounds.[23]

---

[23] We too recall the words of Justice Black, whom the dissenting opinion acknowledges to be "one of the great defenders of First Amendment freedoms." Dissenting op. at 10. In *Bridges* v. *California*, 314 U.S. 252 (1941), where the Court held that the "inherent tendency" of a highly critical out-of-court publication to cause disrespect for the judiciary or to interfere with the orderly administration of justice in a pending case was insufficient to establish punishable contempt, *id.* at 270-73, Justice Black observed that:

> [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Id. at 270-71.

IV. RELIEF

As a result of our holding in this case, appellants are entitled to a declaratory judgment that 40 U.S.C. § 13k is unconstitutional on its face, and to a permanent injunction prohibiting the Government from enforcing section 13k. We remand this case to the District Court to enter the appropriate relief.

So ordered.

MACKINNON, *Circuit Judge*, dissenting in part and concurring in part: In my view the strong governmental interest in preserving the order and decorum necessary to assure due process of law and the appearance of justice at the Supreme Court justifies the limits placed by section 13k on expressive conduct.[1]

I

Section 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

40 U.S.C. 13k. This provision is separable into two discrete parts. The first part prohibits parading, standing, and moving in processions and assemblages. The second part prohibits the display of any flag, banner, or device that is designed or adapted to bring into public notice any party, organization or movement.

The inapplicability of the first part to the three occurrences here in issue[2] is plain. It applies to group

---

[1] The Marshal stated he was acting under "Title 40, United States Code," and that includes authority to apply 18 U.S.C. § 1507. See note 5 *infra*.

[2] Although Zywicki went to the Supreme Court three different times, the purpose on his February 4, 1980 visit is not clear. The record indicates only that he sought "to distribute leaflets concerning political and human oppression in Guatemala." For purposes of adjudging the constitutional question presented, I will not distinguish this incident from the one that occurred on January 8, 1980, when Zywicki distributed pamphlets containing an invitation to religious meetings con-

activity only, and each incident upon which appellants base their complaint involved solitary conduct alone. The meaning of the second part of the section requires closer scrutiny of the statutory language. Although "flag" and "banner" may describe a readily identifiable group of objects, the inclusion of the word "device" makes difficult the task of limiting these three terms to a particular class of objects. It would appear that the reach of "device" would include any object that is capable of display, including Grace's sign and Zywicki's various handbills or leaflets. A search for a reasonable limit on the second part of section 13k, then, leads to the final clause of the section—"designed or adapted to bring into public notice any party, organization, or movement."

I would interpret this portion of the statute to prohibit the promotion of political parties, and organizations and movements for various causes. In my opinion this part of the statute prohibits publicizing or propagandizing political parties and causal movements in the Supreme Court building and grounds. If permitted, such activity would create the impression to some extent in the public's mind that the Supreme Court is embroiled in or affected by such street pressures and picketing. Our tripartite government has a strong interest in sheltering its judicial branch from the appearance of influence by political forces and all outside pressures. The government's interest in order and decorum surrounding its public buildings takes on a completely different tenor when those buildings house the courts and more so with respect to the Supreme Court Building that is devoted *solely* to the business of that court. Pleas to judges from

---

cerning political and human rights problems in Central America.

members of the public are properly confined to the avenues of *due process*. Due process does not permit public pressure or the appearance of public pressure on the judiciary.

When Congress enacted the disqualification statute for federal judges, 28 U.S.C. § 455(a), it provided in effect that even the *appearance* of outside pressures was to be eliminated from the judicial process. This followed earlier decisions of the Supreme Court, requiring that "justice must satisfy the *appearance of* justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) (emphasis added). This principle has been applied in numerous cases. *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971); *In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir. 1980); *Bercheny* v. *Johnson*. 633 F.2d 473, 477 (6th Cir. 1980); *United States* v. *Gigax*, 605 F.2d 507, 510 (10th Cir. 1979) ("if a judge's conduct or appearance in the trial of a case does not comport with the appearance of justice, the conviction must be reversed"); *Watson* v. *United States*, 575 F.2d 808, 809 (10th Cir. 1978); *United States* v. *Robin*, 553 F.2d 8, 11 (2d Cir. 1977) (*en banc*) (sought preservation of the general appearance of fairness); *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (section 455(a) "enunciates the appearance of partiality as the general standard for judicial recusal"); *United States* v. *Brown*, 539 F.2d 467, 469-70 (5th Cir. 1976) (conviction reversed because judge's conduct cast a serious shadow on the appearance of justice); *United States* v. *Meyer*, 462 F.2d 827, 845 (D.C. Cir. 1972); *Rapp* v. *Van Dusen*, 350 F.2d 806, 812 (3d Cir. 1965).

It would be antithetical to require justices in their judicial role to adhere to the appearance of justice by due process and then permit picketing, bannering

and other activity on the Supreme Court grounds that would create the impression in the public mind that justice can be obtained by street pressures outside the courtroom. While public urging, beseeching, and even cajoling are part and parcel of legislative and executive activities, wholly different considerations weigh heavily against the propriety of such importunings in the judicial arena.

With the second part of section 13k so construed the question then becomes whether it covers any or all of the conduct now before the court. Zywicki's leaflet that contained an open invitation to attend several religious meetings concerning "the political and human rights problems" of Central America, *i.e.*, Nicaragua, Guatemala, El Salvador and Honduras, was designed to bring into notice a movement essentially political in nature, seeking to involve our citizens in alleged governmental affairs in Central America. The meetings were billed as a "Religious Reflection in Solidarity with the Oppressed Peoples of Central America." Given the political turmoil that existed in Central America during the time, this pamphlet can only be described as a political leaflet. What one person may view as relieving oppression, others may consider as a communist-inspired attempt at a totalitarian takeover of a nation.

The letter to the editor that appeared in Zywicki's first handbill, which called attention to the necessity for "removing Unfit Judges," urged public support for the then-pending Judicial Tenure Act, and was designed to attract political support to the substantial movement behind that proposed legislation. The Supreme Court has jurisdiction over cases that seek the removal of unfit judges. *See generally Chandler* v. *Judicial Council*, 398 U.S. 74 (1970).

Grace's display of her "free speech" banner also was designed to attract support for the very substantial but amorphous movement in the nation that is constantly agitating for expanded rights under the First Amendment.[3]

---

[3] Grace's conduct also appears to fall within the prohibitions of 18 U.S.C. § 1507, the constitutionality of which is not here challenged. It provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or *with the intent of influencing any judge*, juror, witness, *or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States*, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, *shall be fined not more than $5,000 or imprisoned not more than one year, or both.*

18 U.S.C. § 1507 (emphasis added). Grace alleged that, after learning that some expressive conduct was not permitted at the Supreme Court, she carried her sign containing the First Amendment at the Court because she was "alarmed that a statute could prohibit peaceful freedom of expression on the grounds of the Supreme Court." Complaint ¶ 9. A reasonable inference could be drawn from Grace's behavior that she came to the Court intending to influence a "judge . . . or court officer" to rule that the law concerning public demonstrations at the Court was in violation of the First Amendment.

The majority finds it unnecessary to determine whether appellants' conduct was related to the business of the court, and hence a possible violation of § 1507. *See* Maj. op. at 26. This is anomalous since appellants sought

> to enjoin defendants, their agents, employees or persons acting on their behalf from enforcing in any manner against any person the provisions of 40 U.S.C. § 13(k) *or*

After construing section 13k to prohibit all expressive conduct, the majority finds it facially unconstitutional in toto.[4] In my opinion even such a broad ban on expressive conduct at the Supreme Court may be valid. I believe, however, that section 13k should be given a reasonable construction that puts it on solid constitutional footing. The second part of the section should be limited, as the statute provides, to prevent expressive conduct aimed at promoting and propagandizing political parties and various causes that are supported by the many movements extant in our pluralistic society. So limited, I believe that the weighty interest in maintaining the order and de-

---

any other law or regulation which is applied to prohibit activity akin to that involved in the instant case.

Complaint ¶ 31C (emphasis added). Since the majority has treated this case as raising the issue only of the facial construction of § 13k, I will limit my remarks similarly. It would appear, however, that in determining what relief should be granted it might be concluded that appellants are not entitled to an injunction to prohibit the Supreme Court police from prohibiting "activity akin to that involved in the instant case" since it is arguably prohibited by § 1507. It should be added that further inquiry might show that Zywicki intended to influence the court on either or both of the occasions when he distributed handbills at the Court.

[4] The majority states that it is not "suggest[ing] that any individual may picket or leaflet in the Supreme Court building itself." Maj. op. at 25. It is unusual that the majority would make such a statement, since it today holds unconstitutional the only statute that would prohibit such conduct not aimed at influencing the court. The statement is apparently a recognition of the strong governmental interest in order and decorum within the Supreme Court Building. I do not think this strong interest in order and decorum diminishes materially when the conduct takes place on the narrow grounds that surround the building, rather than in the building itself.

corum of the Supreme Court and the appearance of justice easily suffices to permit Congress to disallow such activity within the Supreme Court Building and grounds.

II

My disagreement also extends to the majority's apparent view that, in light of section 1507, section 13k is superfluous. In my judgment the two provisions are complementary.[5] Section 1507 applies to any building housing a court of the United States and prevents picketing and parading "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty." Section 13k prevents other kinds of activity and applies only to the small area within the Supreme Court Building and grounds. It prevents processions and assemblages on the Supreme Court Building and grounds, unless the Marshal has suspended the law "to permit the observance of authorized ceremonies" pursuant to 40 U.S.C. § 13o. In addition, as I would interpret the second part of section 13k, it precludes the display of objects that are designed to publicize or propagandize political parties, or organizations or movements advocating various causes. It is reasonable to permit greater limitations on expression at the Supreme Court than at buildings housing courts generally since the Supreme Court Building houses only the Supreme Court and is perhaps the only building housing a federal court that does not also contain offices of either the executive or legislative branches of the federal government. Its building and grounds are dedicated

[5] They are both enforceable by the Marshal under 40 U.S.C. § 13n.

solely to the work of the Supreme Court. In enacting sections 13k and 1507 it appears that Congress sought to create an immunized area within the Supreme Court Building and grounds. In tandum, sections 13k and 1507 prohibit (1) parading or picketing that attempts to influence the court, (2) assemblages and processions, and (3) the display of signs involving political parties or other organizations or movements. Two statutes prohibiting closely related conduct with varying penalties may stand together. *United States* v. *Batchelder*, 442 U.S. 114 (1979).[6]

III

Sections 13k and 1507 implement the valid congressional purpose of ensuring that the "order and decorum"[7] that is an essential element of due process of law is preserved at the Supreme Court.

---

[6] In my view the statute should be construed in line with *Lambert* v. *California*, 355 U.S. 225 (1957) to insure that innocent people who did not have knowledge of the statute would not be arrested. From appellants' complaint it appears that the statute has been applied in such manner. In *Lambert* the court reversed a conviction under a Los Angeles ordinance that prohibited a convicted felon from remaining in the city for more than 5 days without registering with the Chief of Police because there was no evidence that the defendant knew of the registration requirement. The Court explained:

> [T]his appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. . . . We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.

355 U.S. at 229.

[7] This is the congressionally stated purpose of the law. S. Rep. No. 719, 81st Cong., 1st Sess. 2 (1949).

In upholding a Louisiana statute prohibiting picketing, "in or near a courthouse," designed to influence the court, Justice Goldberg in *Cox* v. *Louisiana*, 379 U.S. 559 (1965) (*"Cox II"*) enunciated some of the considerations that distinguish areas around courts from other public areas:

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process. See S. Rep. No. 732, 81st Cong., 1st Sess., 4.

379 U.S. at 565.

Cox II describes some of the subtle pressures against which courts should be protected. In the public mind picketing at a public building will be seen as intended to influence the performance of a governmental function carried on within the building by some public officer. With respect to the Supreme Court Building and grounds, a single purpose

area, there is one principal target—the members of the Supreme Court.

In the earlier case of *Cox* v. *Louisiana*, 379 U.S. 536 (1965) (*"Cox I"*), while the Court set aside overbroad statutes relating to peace disturbance and obstructing public traffic that were being discriminatorily enforced, it recognized that:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection.

379 U.S. 554. The present statute is not being abused because it is *uniformly* applied to all.

Later, Justice Black, one of the great defenders of First Amendment freedoms, in upholding a Florida statute that provided trespass on the grounds of a jail, remarked:

> *The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.* For this reason there is no merit to

> the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate . . . ." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *Louisiana*, [379 U.S. 536] at 554-555 and 563-564. We reject it again. *The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.*

Adderley v. *Florida*, 385 U.S. 39, 47-48 (1966) (emphasis added) (footnote omitted).

The same basic rationale found expression in an opinion by Justice Stewart sustaining the prohibition of all demonstrations and political activity on the Fort Dix Military Reservation, including the public thoroughfares within the post that traditionally were open to all:

> *The Court of Appeals was mistaken . . . in thinking . . . that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.* Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant "that people who want to

> propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U.S. 39, 48. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, at 47. See also *Cox.* v. *Louisiana*, 379 U.S. 559, 560-564. Cf. *Pell* v. *Procunier*, 417 U.S. 817.

Greer v. *Spock*, 424 U.S. 828, 836-37 (1976) (emphasis added).

In my judgment the Supreme Court was clearly indicating in these decisions that the government may preserve property under its control, including the Supreme Court Building and grounds, for the use to which it is lawfully dedicated. Congress has done just that in sections 1507 and 13k for the Supreme Court Building and the narrow fringe of grounds that surround it. The principles announced in the *Cox* decisions, and particularly in *Adderley* and *Greer* v. *Spock*, sustain the constitutional validity of such statutes when uniformly applied.

Plaintiffs argue that the decision in *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.) (three-judge court) ("*Jeannette Rankin II*"), *aff'd mem.*, 409 U.S. 972 (1972), is contrary authority. Not so. The court in that case held a statute similar to section 13k that applied to the Capitol Building and grounds to be facially unconstitutional. But Congress occupies the Capitol, and its function, the extent of its "grounds" and their historical use differ substantially from the purpose to which the Supreme Court Building and its narrow grounds are dedicated and used. Congress and the Supreme Court also differ substantially in structure, operation and purpose.

In the first place the comparative areas of the respective "grounds" of the Capitol and the Supreme Court are greatly disproportionate. The Supreme Court grounds comprise slightly less than two and one-half normal city blocks, most of which are occupied by the Supreme Court Building.[8] The Capitol grounds, on the other hand, extend from the Union Station approximately ten blocks South to D Street, S.W. (about a mile), and, at its widest point, from Second Street, S.E., seven blocks to Third Street, S.W., comprising an irregular area of at least 60 square blocks.[9] This immense area covers the environs of the Capitol, the Senate Office Buildings, the House Office Buildings, the congressional garages, and extends to all the surrounding streets and the very extensive park-like grounds and walks. The area even includes the de-

---

[8] 40 U.S.C. § 13p provides that the "Supreme Court grounds" are limited to the area within the curblines of First Street, N.E.; Maryland Avenue, N.E.; East Capitol Street; and Second Street, N.E.

[9] This description is based on the map referred to in the statute that defines the Capitol grounds:

> The United States Capitol Grounds shall comprise all squares, reservations, streets, roadways, walks, and other areas as defind on a map entitled "Map showing areas comprising United States Capitol Grounds", dated June 25, 1946, approved by the Architect of the Capitol and recorded in the Office of the Surveyor of the District of Columbia in book 127, page 8, including all additions added thereto by law subsequent to June 25, 1946, and the jurisdiction and control over the United States Capitol Grounds, vested prior to July 31, 1946, by law in the Architect of the Capitol, is extended to the entire area of the United States Capitol Grounds, and the Architect of the Capitol shall be responsible for the maintenance and improvement thereof . . . .

40 U.S.C. § 193a.

tached area surrounding the Capitol Power Plant, several blocks to the south of the Capitol.

Judge McGowan's decision in *Jeannette Rankin II* recognized that "[w]hether the Capitol Grounds is an area to which access cannot be denied broadly or absolutely depends . . . on whether it has been ordinarily open to the public . . . or whether . . . the uses for which it has traditionally been put are inconsistent with demonstrations and mass assemblies." 342 F. Supp. at 583-84. In referring to the Supreme Court's decision in *Cox II* the *Rankin II* court stated:

> In *Cox II* . . . the Supreme Court upheld a state statute which banned parades and picketing "in or near courthouses" which have the "intent of interfering with, obstructing, or impeding the administration of justice, or . . . the intent of influencing any judge [or] juror. . . ." The Court felt that the integrity of the judicial process could not survive in an atmosphere of mob excitement. But while, as Judge Bazelon said (dissenting in *Jeannette Rankin* [*I*], [421 F.2d 1090 (D.C. Cir. 1969)]), "*traditionally, the judiciary does not decide cases by reference to popular opinion," the fundamental function of a legislature in a democratic society assumes accessibility to such opinion.* Moreover, the Capitol Grounds defined in this statute are so extensive that demonstrations which may take place upon them might not be "near" or "in the immediate vicinity of" the Capitol itself.

342 F. Supp. at 584 (emphasis added).[10]

---

[10] The *Rankin II* court acknowledged that

> the Supreme Court has held that there are some areas in which the Government may absolutely prohibit the exercise of First Amendment rights, especially the right to

The area of the Supreme Court thus differs from the Capitol grounds in three particulars: (1) the traditional use of the Supreme Court grounds has been inconsistent with demonstrations, mass assemblies, and picketing—and it has never become a public forum; (2) the fundamental function of the Supreme Court does not assume accessibility to street opinion conveyed by parading mass assemblages and individual picketing; and (3) the Supreme Court grounds are so small that demonstrations and picketing upon them would be "near" and "in the immediate vicinity of" the Supreme Court Building itself.

IV

The applicable statutes serve the important and substantial governmental interest of maintaining "order and decorum" for the entire Court area and preserving the "appearance of justice." Judges, lawyers, litigants and the general public are able to enter and leave the Court and go about their business or activity free from the importuning that necessarily follows having pamphlets pressed upon them and signs and banners confront them for every conceivable political, judicial and personal cause. The statutes are necessary to preserve the ideal of "Equal Justice Under Law" and to avoid the existence or appearance of outside pressure or influence.

In contrast to the purpose of the Capitol, the declared purpose of the Supreme Court Building is to furnish

---

assemble. Jails, for instance, may be put off limits to parades and other political demonstrations. Adderly v. Florida, 385 U.S. 39 (1966). The area surrounding a courthouse may be similarly immunized. Cox v. Louisiana, 379 U.S. 559 (1965) ("Cox II").

342 F. Supp. at 583 (footnote omitted).

the citizens of this nation a *due process* environment in which the nation's most important judicial issues may be presented, heard and decided without even the semblance of influence by street pressures. Order and decorum within the building and its surroundings are required if this necessary objective is to be guaranteed. The Supreme Court is the center of an area where the rule of law is intended to prevail and extraneous pressures are not permitted. The Supreme Court decides cases based upon the rule of law, not upon the level of public pressure that might be generated by mass assemblages and other public activities within the Supreme Court Building or on the adjacent grounds and walkways. The Court should not be subjected even to the subtle pressures of allegedly innocuous picketing and leafleting.

The governmental interest in the order and decorum surrounding the Supreme Court, as reflected in the questioned statute, is unrelated to the suppression of free expression. The proper application of this statute is demonstrated by the fact that the Supreme Court Marshal follows a uniform rule of prohibiting activity without reference to expressive content. The Marshal thus does not suppress any particular views or just views that he or the court does not wish to hear. There is no prior restraint of any particular viewpoint. All are treated equally.

Appellants' real objective here is to establish a *public forum* on the narrow grounds surrounding the Supreme Court. It appears that their plan was carefully devised and followed legal advice. Complaint ¶ 16. But the areas within the Supreme Court Building and grounds have never been dedicated to that purpose. To permit such conduct now would subvert the Supreme Court in its effort to provide due process and "Equal Justice

Under Law." What would start as two lonely peaceful pickets today would eventually lead to the hordes of tomorrow,[11] bannering and distributing leaflets (in a peaceful manner) on abortion, school busing, prayers in public schools, civil rights, greater rights for the press and media, free spech, *Miranda*, the exclusionary rule, search and seizure, obscenity, and a host of other issues. That appellants seek to establish a public forum to picket, etc., on *past* decisions and possible *future* cases is apparent from their suggestion for limiting the reach of 18 U.S.C. § 1507. They argue that it should only apply to cases *currently pending in the Supreme Court*. There are so many potential judicial issues that are the subject of on-going public campaigns and movements that even though a specific case involving the precise issue may not at a particular moment be *sub judice* in the Supreme Court, there is a strong likelihood that the issue will sometime come before the Court. In view of such fact and the wide range that would be open for seeking reversal of past decisions, it would be unreasonable and unrealistic to limit the statute only to pending cases.

For all of the above reasons, I dissent from the majority's effort to establish a public forum within the Supreme Court Building and grounds.

---

[11] In Quaker Action Group v. Andrus, 559 F.2d 716 (D.C. Cir. 1977) this court indicated that an Interior Department regulation that limited demonstrations to a maximum of 750 persons on the White House sidewalk and 3000 in adjacent Lafayette Park was reasonable, only when coupled with a provision for waiving the maximum upon a showing of good cause. To avoid just such a melee the congressional statute in effect declares that the area within the Supreme Court and grounds is *not* a public forum. 40 U.S.C. § 13k.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

Civil Action No. 80-01205

No. 80-2044

MARY TERESE GRACE
THADDEUS ZYWICKI, APPELLANTS

v.

WARREN E. BURGER
CHIEF JUSTICE OF THE
UNITED STATES SUPREME COURT, ET AL.

Filed September 22, 1981

Before: MacKinnon, Circuit Judge

ORDER

It is ORDERED, by the Court, *sua sponte*, that the separate statement by Circuit Judge MacKinnon, dissenting in part and concurring in part, in the above entitled case on September 8, 1981 be, and it hereby is, amended as follows:

Page 1, lines 1 & 2—italize "*dissenting in part and concurring in part*".

Page 2, first full paragraph, line 2—delete the comma after "parties" and before "and" and insert "of" after the word "and" and before the word "organizations".

Page 3, line 15—delete the word "section" and insert in lieu thereof "28 U.S.C. §".

Page 15, line 5 of fn. 11/—delete the comma after the word "reasonable" and before the word "only".

PER CURIAM

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

Civil Action No. 80-01205

No. 80-2044

MARY TERESE GRACE
THADDEUS ZYWICKI, APPELLANTS

v.

WARREN E. BURGER
CHIEF JUSTICE OF THE
UNITED STATES SUPREME COURT, ET AL.

Filed September 8, 1981

Appeal From the United States District Court
for the District of Columbia

Before: MacKINNON, EDWARDS and GINSBURG, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court on appeal herein is

reversed and the case is remanded to the District Court with instructions to enter the appropriate relief, in accordance with the opinion of this Court filed herein this date.

PER CURIAM

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 8, 1981

Opinion for the Court filed by Circuit Judge Edwards

Separate statement by Circuit Judge MacKinnon, dissenting in part and concurring in part.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 80-01205

No. 80-2044

MARY TERESE GRACE
THADDEUS ZYWICKI, APPELLANTS

v.

WARREN E. BURGER
CHIEF JUSTICE OF THE
UNITED STATES SUPREME COURT, ET AL.

Filed November 12, 1981

Before: MacKinnon, Edwards and Ginsburg, Circuit Judges

ORDER

On consideration of appellees' petition for rehearing, filed October 22, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

PER CURIAM

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

/s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 80-01205

No. 80-2044

MARY TERESE GRACE
THADDEUS ZYWICKI, APPELLANTS

v.

WARREN E. BURGER
CHIEF JUSTICE OF THE
UNITED STATES SUPREME COURT, ET AL.

Argued May 27, 1981

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion is denied.

PER CURIAM

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

/s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Robb and Wilkey would grant the suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 80-01205

No. 80-2044

MARY TERESE GRACE
THADDEUS ZYWICKI, APPELLANTS

v.

WARREN E. BURGER
CHIEF JUSTICE OF THE
UNITED STATES SUPREME COURT, ET AL.

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

It is ORDERED by the Court *en banc* that the order of November 12, 1981, be, and the same hereby is, amended by deleting the footnote and inserting in lieu thereof the following:

> Circuit Judges MacKinnon, Robb and Wilkey would grant rehearing *en banc* for the reasons set forth in the dissenting opinion of Judge MacKinnon.

PER CURIAM

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

/s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1205

MARY T. GRACE, ET AL., PLAINTIFFS

v.

WARREN E. BURGER, ET AL., DEFENDANTS

Filed August 7, 1980

MEMORANDUM

Plaintiffs seek to enjoin Supreme Court police officials who threatened to arrest the plaintiffs when they peacefully displayed signs and distributed leaflets on the sidewalk in front of the Supreme Court building. Plaintiffs also seek a declaration that the statutes relied upon by those officials as the authority for the threatened arrests are unconstitutional. 40 U.S.C. § 13(k); *see also* 40 U.S.C. § 13(l).[1]

A.

The essential facts are not in dispute. Plaintiff Mary Terese Grace entered upon the sidewalk in front of the

---

[1] 40 U.S.C. § 13(k) provides that:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

40 U.S.C. § 13(l) authorizes the Supreme Court Marshal to issue regulations for the "maintenance of suitable order and decorum within the Supreme Court Building and grounds."

Supreme Court building shortly after noon on March 17, 1980, and began to display a sign, approximately four feet by two and one-half feet, upon which were inscribed, verbatim, the words of the first amendment. Within a few minutes, a Supreme Court police officer approached Grace and instructed her to go across the street. The officer indicated in response to Grace's inquiry that the law, and more specifically 40 United States Code, required that she leave. After some further exchange of words the officer informed her that if she did not move she would have to come with him into the Supreme Court building. Fearing arrest, Grace left.

Plaintiff Thaddeus Zywicki entered upon the sidewalk in front of the Supreme Court in May, 1978, and began distributing to passersby leaflets which were reprints of a letter to the Editor of the *Washington Post* from a United States Senator concerning the subject of removal of unfit judges from the bench. Near Zywicki, and also on the Supreme Court grounds, was a coin-operated newsstand for the *Washington Star*. After Zywicki had distributed a few of these leaflets, a Supreme Court police officer approached him and stated that Title 40 of the United States Code prohibited the distribution of leaflets on Supreme Court grounds. Fearing arrest, Zywicki left.

On January 8, 1980, Zywicki returned to Supreme Court grounds to distribute pamphlets containing invitations to and information about several meetings and events termed "religious reflection[s] in solidarity with oppressed peoples of Central America," Guatemala, and Latin America. *See* Exhibit 2 to Complaint, filed May 13, 1980. Shortly after his arrival, however, Zywicki was approached by a Supreme Court police officer and informed that he was

prohibited by law from distributing leaflets on Supreme Court grounds. When the officer, in response to Zywicki's inquiry, indicated that Zywicki would be arrested if he continued leafletting, Zywicki left.

On February 4, 1980, Zywicki again entered upon Supreme Court grounds and began distributing handbills allegedly concerning "political and human oppression in Guatemala." Complaint, filed May 13, 1980, at ¶ 16. Zywicki had been informed by counsel that a Superior Court judge had "narrowed the application" of 40 U.S.C. § 13(k) to prohibit only conduct engaged in "with the specific intent of influencing, impeding, or obstructing the administration of justice." *Id.* Shortly after Zywicki began distributing the handbills, however, he was once again instructed that he would be subject to arrest if he persisted. At the time of this warning, Zywicki and the officers involved were standing near a *Washington Post* vending machine. After protesting that newspapers were allowed to distribute printed matter on the grounds while he was denied that "right," Zywicki left.

Plaintiffs claim that they had no intention to interfere with the business of the Supreme Court or influence the Court with respect to any given case. Indeed, Ms. Grace acted because she was "alarmed that a statute could prohibit peaceful freedom of expression on the grounds of the Supreme Court." *Id.* at ¶ 9.

Plaintiffs do not claim that they applied to the Supreme Court Marshal for any permit to engage in the conduct for which they seek judicial protection or sought any ruling from him before they physically appeared on the Supreme Court grounds. *Compare Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575, 578 n.5 (D.D.C. 1972) McGowan,

J. for a three-judge court). On the other hand, 40 U.S.C. § 13(1) authorizes the Supreme Court Marshal to issue and publish regulations for the "maintenance of suitable order and decorum within the Supreme Court building and grounds." The only such regulation was published on November 26, 1975, to fix the hours during which the Supreme Court building is open to the public. The Marshal has, however, furnished an affidavit in these proceedings about his practice and that of his officers to advise any person carrying a sign, passing out leaflets or participating in a demonstration on the Supreme Court grounds to cease and leave the grounds or be arrested. The affidavit asserts that this is a uniform practice and that those who do not cease and leave are arrested. According to the affidavit, this practice is enforced uniformly without regard to the message of the expressive conduct. Affidavit of Alfred Wong, Marshal of the Supreme Court, May 27, 1980.

B.

Plaintiffs contend that the statute's potential for improper application discourages exercise of first amendment freedoms and that it lends itself to discriminatory enforcement. Plaintiffs emphasize that, unlike the defendants in *Cox* v. *Louisiana*, 579 U.S. 559 (1965), who appeared 2,000 strong approximately 100 feet in front of a Louisiana courthouse, each of the two plaintiffs here sought to engage in "pure speech such as lone leafletting and lone signholding". Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment, p. 3. Plaintiffs contend that where such first amendment rights are at stake "the burden is

on the Government to demonstrate a legitimate and compelling Governmental interest in sustaining the statute on its face and as applied," and they urge this Court to "engage in a factored balancing analysis to evaluate whether a statute is susceptible to improper application and is necessary to accomplish a legitimate Government interest." *Id.* Such a process should, they contend, lead to the conclusion that the Government's interest in protecting the Supreme Court from outside influence does not justify interference with their peaceful, solitary and unobtrusive leafletting and sign carrying.

The District of Columbia Superior Court has exclusive jurisdiction over prosecutions under § 13(k).[2] Plaintiffs point to a decision of that Court that § 13(k) by its terms reaches only persons who carry signs or distribute leaflets on the Supreme Court grounds "with the intent to disrupt, interfere with, or impede the administration of justice, or with the intent of influencing the administration of justice." *United States* v. *Ebner, et al.*, Docket No. 12487-79 (Hannon, J.) January 22, 1980. Plaintiffs represent that they did not intend to interfere with or disrupt the Supreme Court and therefore should be declared immune from arrest or threat of prosecution. Thus, plaintiffs urge, in effect, that even if the statute were itself valid, as written, it does not proscribe their leaflets and signs.

---

[2] 40 U.S.C. § 13(m) provides that:

> Whoever violates any provisions of sections 13g-13k of this title, or of any regulation prescribed under section 13*l* of this title, shall be fined not more than $100 or imprisoned not more than sixty days, or both, prosecution for such offenses to be had in the municipal court for the District of Columbia, upon information by the United States Attorney or any of his assistants.

Defendants counter with reference to Supreme Court decisions sustaining the constitutionality of statutes which foreclose expressive conduct near a United States courthouse in aid of the "legitimate Government interest in protecting the judicial system from the pressures which picketing near a courthouse might create."[3] *Cox* v. *Louisiana*, 379 U.S. at 562. Defendants also cite Justice Black's opinion in *Adderly* v. *Florida*, 385 U.S. 9, 47-48 (1966), rejecting "the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." Defendants emphasize the distinction drawn in *Jeannette Rankin Brigade*, *supra*, between the constitutional responsibility of the legislative branch to be responsive to public petition and opinion and the need of courts to act solely on formally filed pleadings and records as addressed in oral argument in the courtroom in a form prescribed by court rule and custom. Thus, pointing to this distinction, Judge McGowan's opinion suggests that "there are some areas [such as courthouses] in which the Government may absolutely prohibit the exercise of first amendment rights, especially the right to assemble." *Jeannette Rankin Brigade* v. *Chief, Capitol Police*, 342 F. Supp. at 583. The Supreme Court site which defendants would insulate from leaflets and signs is, they point out, small and

---

[3] 18 U.S.C. § 1507 provides in relevant part that:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, . . . or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, . . . shall be fined not more than $5,000 or imprisoned not more than one year, or both.

well defined by statute. Moreover, there are other areas nearby, on the Capitol grounds and elsewhere in and near the city, which are available by law for the kinds of expressive conduct for which plaintiffs seek special protection here. *See e.g., Quaker Action Group* v. *Morton*, 516 F.2d 717 (D.C. Cir. 1975) (*Quaker Action IV*); *Jeannette Rankin Brigade* v. *Capitol Police, supra.* Defendants urge that these factors considered together fully support their opposition to plaintiffs' motion.

C.

On the merits, this case poses nice questions as to the scope and the statutory authority relied upon by Supreme Court officials to threaten the plaintiffs with arrest. Arguably, neither section 13(k) (nor 18 U.S.C. § 1507), by their terms, reach an individual carrying a message on a sign or in pamphlets or leaflets, unassisted by any other person and without apparent attempt to interfere with or influence the Supreme Court or its officials. Normally, if the Marshal adheres to his practice of arresting such persons on authority of 40 U.S.C. § 13(k), the construction of the statute would be resolved in a criminal trial. The trial and appellate courts would construe the statute in the context of specific evidence about the expressive conduct, the intentions of those engaged in it, and the business of the Supreme Court at that time. Such a prosecution would of course be conducted in the shadow of the Superior Court ruling that the statute does not reach particular conduct on the Supreme Court grounds in the absence of proof that the conduct was intended to interfere with the Supreme Court itself.

To resolve these questions the defendants advocate a construction of the statute which would pro-

scribe conduct like that engaged in by plaintiffs without regard to their intention. They construe the statute as barring any sign or leaflet on the Supreme Court grounds without regard to the purpose or effect of the sign or leaflet. They also construe the statute to bar the carrying of any sign or the distribution of any leaflet, irrespective of whether the carrying and distribution is the work of one person or many persons.

There is support for this construction in the representation by the Marshal as the person charged by Congress with administration of the statute that it has been his practice to enforce it against any person carrying a sign or passing out leaflets on the Supreme Court grounds. Such a construction would eliminate the practical and legal problems which would arise if the Marshal were required to determine in each case the intention of each person engaged in expressive conduct at the Supreme Court or otherwise evaluate the content of that expression. The Court notes, without deciding, however, that 40 U.S.C. § 13(l) may contemplate that the Marshal's interpretations of this particular statute (40 U.S.C. § 13(k) such as those reflected in the Marshal's affidavit, should be recorded in regulations, approved by the Chief Justice, and published. The Marshal's failure to follow the procedure prescribed by § 13(l) would obviously complicate any effort by the Marshal to consummate his threat of arrest with a successful prosecution. *See e.g., United States* v. *Ebner, et al., supra.* More important here, this defect in the Marshal's execution of his statutory authority and the resulting risk that an arrest and prosecution might result in a dismissal or acquittal, could give color to plaintiffs' claim that the threat of

arrest has the effect and purpose of an impermissible form of prior restraint.

D.

From the foregoing, it seems apparent that plaintiffs have a first amendment claim which they could assert in defense of any prosecution. They may even have a first amendment claim for any damages caused them by an arrest or threat of arrest in violation of their first amendment rights. *See Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971); *Butz* v. *Economou*, 438 U.S. 478 (1978). But, they do not raise the constitutional claim here either in defense of a criminal action or to vindicate damages already suffered. They invoke equity to protect themselves against the allegedly chilling effect of threatened arrest and prosecution. They seek a declaratory judgment and an injunction against the Supreme Court Marshal which would affect his discharge of his duties, not only with respect to these plaintiffs, but also in other unpredicted and unpredictable circumstances as well. A court has broad discretion to exercise or decline to exercise its power to enjoin public officials in the performance of their duties. The difficulty of anticipating the particular facts that might obtain in some future situation not now before the court and the relatively timeless nature of plaintiffs' claim militate against exercise of that discretion in favor of the plaintiffs here and now.

Plaintiffs appear not to have any interest in any case before the Supreme Court and do not seek an opportunity to express themselves about anything except their "alarm" that "a statute could prohibit peaceful freedom of expression on the grounds of the

Supreme Court." Thus, their ultimate objective is not to express themselves about a cause or an idea. They engaged in expressive conduct and exposed themselves to the threat of arrest in order to precipitate litigation which would test the reach and the validity of the statute here challenged. They wisely prefer to assert their right and test the statute without further risking their liberty as by arrest, prosecution and possible confinement.

If there were no other way for the plaintiffs to raise the question they put, this court might have no alternative but to reach and resolve the substantial statutory and constitutional problems lurking here. The plaintiffs' interest in free expression near the Supreme Court and the Marshal's threat to arrest them for leafletting and carrying signs probably gives them standing and creates a genuine case or controversy as to the reach of the statute, and if it reaches plaintiffs, its validity. But an equity court need not resolve a case or controversy whenever and however it is presented. For example, when persons seeking equitable relief have failed to exhaust the administrative processes available to them and have a possibility of judicial review of an unfavorable administrative decision, courts generally withhold equitable relief until that administrative/judicial process has been exhausted. *E.g., Douglas* v. *Hampton*, 512 F.2d 976, 988-89 (D.C. Cir. 1975). That is the situation here. Plaintiffs have neither petitioned the Supreme Court Marshal to exercise his authority to issue regulations nor applied to him for a permit individually and peaceably to carry a sign or pass leaflets at the Supreme Court at a particular time and place, for a particular purpose. *Compare Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 372 F. Supp. at 578. At least until plaintiffs have

sought relief from the Marshal, and he has denied it by action (or inaction), this suit should not be entertained.

Plaintiffs' obligation to pursue their administrative remedy is neither foreclosed nor rendered futile by the Marshal's affidavit in this case or by his broad construction of the statute described there. The affidavit does not purport to reflect exercise by the Marshal or his power to issue and publish regulations relating to order and decorum at the Supreme Court. The affidavit does not notify the public in the manner contemplated by § 13(l) of the Marshal's view of the reach of the statute.[4] Nor does the affidavit reflect consideration by the Marshal of a particular application to engage in particular expressive conduct at a particular place or time.

It may be that in the context of the decided cases the Marshal, in his discretion, would adopt regulations which do not categorically proscribe a single statement in a decorous sign of modest size and proportion by a lone individual when, for example, the

---

[4] The practice evidenced by the Marshal's affidavit is not the legal equivalent of the sheriff's "on-the-spot" ruling in *Cox* v. *Louisiana*, 379 U.S. at 568-70. There the Supreme Court accepted the sheriff's informal delineation of a site about 100 feet away from a county courthouse as a binding determination of what was "near" the courthouse within the meaning of the governing state statute. *Compare* 18 U.S.C. § 1507. Proximity to the Supreme Court is not a problem here, however. 40 U.S.C. § 13(p) defines the Supreme Court site quite specifically for purposes of § 13(k). Furthermore, each interpretation of § 13(k) is not only for the purpose of interpreting ambiguities in it; 40 U.S.C. § 13(l), seems to anticipate that the Marshal write and publish such interpretation in a regulation, rather than rely on informal on-the-spot rulings or unpublished "practices" evidenced only by a litigation affidavit.

Court is in recess. Or the Marshal may choose to publish a regulation or deny a permit application by plaintiffs in terms that would clarify the reach of the relevant statutes along the lines indicated in the Marshal's affidavit. There is potential merit in a regulation construing § 13(k) to draw sharp, clear lines which would narrow the Marshal's discretion to make judgments about the intention of leafletters and sign carriers or to attempt to distinguish between them on account of the content of the messages. In addition, accompanying comment on a regulation or ruling might communicate to the plaintiffs and to the public an appreciation of the constitutional need to facilitate the ability of courts, and particularly the Supreme Court, "to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." *See Cox.* v. *Louisiana*, 379 U.S. at 583 (Black, J., concurring).

This is not a case where time is of the essence of plaintiffs' first amendment claim. They make their first amendment claim for the limited purpose of defining (as distinguished from exercising) first amendment rights. This they are free to do by application to the Marshal without risk of arrest. Furthermore, they do not deny that in the interim they could freely express themselves publicly on any subject at many other nearby places. And, as a matter of fact, there is no prior restraint on plaintiffs' exercise of their claimed rights on the Supreme Court grounds, except their uncertainty as to whether such rights exist and the risk of arrest. Freedom from such uncertainty and risk is not necessarily and universally guaranteed by the constitution.

Until the plaintiffs have attempted and exhausted administrative application to the Supreme Court

Marshal for a regulation or a permit, the threat of arrest is not an impermissible prior restraint on the plaintiffs' opportunity to test their right to engage in expressive conduct on the Supreme Court grounds. Therefore, they have not established a claim which justifies judicial intervention through the extraordinary processes of declaratory judgment and injunction.

Given this disposition of the matter, and pending application by the plaintiffs to the Marshal, it is unnecessary to consider the plaintiffs' claim of discriminatory enforcement because local newspapers are sold from vending machines on the Supreme Court grounds.

An appropriate Order accompanies this Memorandum.

/s/ Louis F. Oberdorfer
United States District Judge

Date: August 6, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1205

MARY T. GRACE, ET AL., PLAINTIFFS

v.

WARREN E. BURGER, ET AL., DEFENDANTS

Filed Aug. 7, 1980

ORDER

Upon consideration of the pleadings, briefs, affidavit and arguments of counsel, and for reasons more fully stated in the accompanying Memorandum, it is this 6th day of August 1980, hereby

ORDERED, ADJUDGED AND DECREED: That the plaintiffs have failed to exhaust administrative remedies available to them and it is

FURTHER ORDERED, ADJUDGED AND DECREED: That therefore the Complaint should be and is hereby dismissed without prejudice.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2044

(C.A. No. 80-1205)

MARY T. GRACE, ET AL., APPELLANTS

v.

WARREN E. BURGER, ET AL., APPELLEES

APPELLEES' NOTICE OF APPEAL

Notice is hereby given this 11th day of December, 1981 that Appellees United States and Alfred Wong, James Zagani and John H. Derexhagan hereby appeal, pursuant to 28 U.S.C. § 1252 to the United States Supreme Court from the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on the 8th day of September, 1981 in favor of appellants and against appellee United States; petition for rehearing and suggestion for rehearing *en banc* were denied by order of November 12, 1981.

/s/ Charles F. C. Ruff
CHARLES F. C. RUFF
United States Attorney

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ Kenneth M. Raisler
KENNETH M. RAISLER
Assistant United States Attorney

/s/ R. Craig Lawrence
R. CRAIG LAWRENCE
Assistant United States Attorney
Attorneys for Appellees

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 369360 838

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1863

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA, et al., Appellants;

v.

MARY T. GRACE, THADDEUS ZYWICKI, Appellees

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

SEBASTIAN K.D. GRABER
BRADLEY S. STETLER
NORMAN A. TOWNSEND
Counsel for Appellees

GRABER, STETLER & TOWNSEND
1019 King Street
P.O. Box 146
Alexandria, VA 22313
(703) 548-2110

QUESTION PRESENTED

Whether 40 U.S.C. §13k, which prohibits all expressive activity anywhere on the Supreme Court grounds, no matter how unobtrusive or unrelated the expression is to the administration of justice, violates the First and Fifth Amendments.

TABLE OF CONTENTS

	Page
Question Presented.	i
Table of Authorities.	iii
Opinions Below.	1
Jurisdiction.	1
Statutory Provision Involved.	2
Statement	2
Argument.	9
Conclusion.	19

TABLE OF AUTHORITIES

Cases: Page

Adderly v. Florida, 385 U.S. 39 (1966) 18

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1967) . . 13

Bridges v. California, 314 U.S. 252 (1941) 13

Buckley v. Valeo, 424 U.S. 1 (1976) 18

Cantwell v. Connecticut, 310 U.S. 296 (1940) 14

Carroll v. President and Comm'rs of Princess Anne County, 393 U.S. 175 (1968) 14

Cohen v. California, 403 U.S. 15 (1971) 17

Cooper v. Aaron, 358 U.S. 1 (1958) 20

Cox v. Louisiana, 379 U.S. 559 (1965) 7,15,16

Grayned v. City of Rockford, 408 U.S. 104 (1972) . . 10,13,19

Greer v. Spock, 424 U.S. 828 (1976) 18

Hague v. CIO, 307 U.S. 496 (1939) 13

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 18

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) . . . 13

Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C.), aff'd mem., 409 U.S. 972 (1972) 12,15

Larson v. Valente, No. 80-1666, 50 U.S.L.W. 4411 (U.S. April 21, 1982) 16

Lovell v. Griffin, 303 U.S. 444 (1938) 14

Martin v. Struthers, 319 U.S. 141 (1943) 13

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 14

NAACP v. Button, 371 U.S. 415 (1963) 14

Schneider v. State, 318 U.S. 147 (1939) 15

Shelton v. Tucker, 364 U.S. 479 (1960) 14

Spence v. Washington, 418 U.S. 405 (1974) 15

TABLE OF AUTHORITIES (cont.)

Cases (cont.): Page

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 15

United States v. Ebner, No. 12487-79, (D.C. Super. Ct. January 22, 1980) 3

United States v. O'Brien, 391 U.S. 367 (1968) 14,17

Constitution and statutes:

United States Constitution, First Amendment . . . passim

United States Constitution, Fifth Amendment . . . 1,5,11,19

18 U.S.C. §1507 . . . . . .

28 U.S.C. §1252 1

40 U.S.C. §13a. 7

40 U.S.C. §13c. 8

40 U.S.C. §13f. 8

40 U.S.C. §13g. 8

40 U.S.C. §13h. 8,10,12

40 U.S.C. §13i. 8

40 U.S.C. §13j. 8,17

40 U.S.C. §13k. . . . . passim

40 U.S.C. §13l. 8,16

40 U.S.C. §13m. 9

40 U.S.C. §13n. 9

40 U.S.C. §13o. 9

40 U.S.C. §13p. 9

Miscellaneous:

Supreme Court of the United States Police Training Manual (1972)(unpublished). 8

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment and opinion of the court of appeals be affirmed on the ground that it is manifest that the decision of the court of appeals is plainly correct, such that further argument on the issue in this Court is unnecessary. Appellees request the Court to enter an Order affirming the court of appeals on the ground that 40 U.S.C. §13k is repugnant to the First and Fifth Amendments.

OPINIONS BELOW

The opinion of the court of appeals (Appendix to Appellants' Jurisdictional Statement 1a-49a)[hereinafter, Gov't App.] is reported at 665 F.2d 1193 (D.C.Cir. 1981). The opinion of the district court is reported at 524 F.Supp. 815 (D.D.C. 1980)(Gov't App. 56a-68a).

JURISDICTION

The judgment of the court of appeals (Gov't App. B 50a-51a) was entered on September 8, 1981, and a petition for rehearing or for rehearing en banc was denied on November 12, 1981 (Gov't App. C 52a). A notice of appeal was filed on December 11, 1981 (Gov't App. E 70a). Mr. Justice Brennan, on February 2, 1982, extended the time for docketing the appeal up to and including April 9, 1982.

Appellate jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1252.

STATUTORY PROVISION INVOLVED

40 U.S.C. §13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

Other relevant statutory provisions are set forth in Appellees' Appendix 31a-37a [hereinafter, Grace App.].

STATEMENT

A. Facts[1/]

In May 1978 appellee Thaddeus Zywicki, an elderly Catholic missionary, stood alone on the sidewalk in front of the Supreme Court near a coin-operated Washington Star vending machine. Complaint, Grace v. Burger, No. 81-1205 (D.D.C. filed May 13, 1980) [hereinafter, Complaint] ¶12 (Grace App. 1a-2la, 4a). Mr. Zywicki was distributing a handbill which contained a reprint of a letter to the editor of The Washington Post from a United States Senator concerning the subject of removal of unfit judges from the bench. Complaint ¶12 and Exhibit 1 to Complaint (Grace App. 4a, 11a). A Supreme Court police officer approached Mr. Zywicki and informed

---

1/ Since the district court dismissed appellees' Complaint for failure to exhaust administrative remedies (Gov't App. 69a), the facts outlined in the Complaint are to be taken as true. Both the government and the district court have accepted the factual allegations of the Complaint (Gov't App. 3a & n. 3, 56a).

The district court's ground for dismissal has never been advanced or adopted by the government. See Jurisdictional Statement at 3 & n. 2; Grace v. Burger, 665 F.2d 1193 (D.C. Cir. Sept. 8, 1981)(Gov't App. 1a-47a, 5a-8a) [hereinafter Grace v. Burger]; and Brief for [Government] Appellees in the court of appeals at 4 ("we do not advance the exhaustion of administrative remedies reasoning of the District Court ...").

him that Title 40 of the federal code prohibited the distribution of leaflets on Supreme Court grounds, which included the sidewalk abutting the curb. Complaint ¶13 (Grace App. 4a-5a). Fearing arrest, Mr. Zywicki left the Supreme Court grounds.

On January 8, 1980, Mr. Zywicki returned to the sidewalk in front of the Court, this time distributing handbills containing an invitation to the recipient to attend a religious meeting termed "a religious reflection in solidarity with the oppressed peoples of Central America." Complaint ¶14, Exhibit 2 to Complaint (Grace App. 5a, 12a). An officer soon approached Mr. Zywicki and informed him that an Act of Congress forbade leafletting on Supreme Court grounds. Mr. Zywicki asked the officer whether he would be arrested if he continued leafletting to which the officer responded that he would. Fearing arrest, Mr. Zywicki again left. Complaint ¶15 (Grace App. 5a).

On February 4, 1980, Mr. Zywicki once again attempted to distribute leaflets on the sidewalk in front of the Court near the newspaper vending machines. Complaint ¶¶16, 18 (Grace App. 5a-6a). Counsel herein had informed Mr. Zywicki that a judge of the Superior Court of the District of Columbia in a criminal prosecution under 40 U.S.C. §13k in the Superior Court, had narrowed the application of §13k to conduct performed with the specific intent to influence, impede or obstruct the administration of justice. Complaint ¶16; Exhibit 3 to Complaint (United States v. Ebner, No 12487-79, transcript of proceedings at 40-41)(D.C. Super. Ct. Jan. 22, 1980)(Hannon, J.)(Grace App. 5a-6a, 18a-19a). When Mr. Zywicki informed counsel that he wanted to distribute handbills concerning human and political oppression in Guatamala, counsel informed Mr. Zywicki that §13k, as narrowed by the Superior Court, would allow such leafletting. Complaint ¶16 (Grace App. 5a).

On February 4, 1980, Mr. Zywicki distributed a few handbills, but was soon approached by a Supreme Court police officer who warned Mr. Zywicki that unless he ceased leafletting, he would be arrested. Mr. Zywicki stated that he understood the statute had been modified by a judge. Complaint ¶18 (Grace App. 6a). The officer used a walkie-talkie and apparently called someone inside the Supreme Court building. Eventually a Mr. White emerged from the building and informed Mr. Zywicki that the statute had not been changed and that Mr. Zywicki was subject to arrest for leafletting on Supreme Court grounds. Id. Mr. Zywicki protested the fact that the newspaper was allowed to distribute its papers while appellee was prohibited from distributing printed matter of his choosing. Complaint ¶19 (Grace App. 6a). Mr. Zywicki also asked why the statute did not forbid raising and lowering the American flag, displayed on the outside grounds of the Court. Id. To avoid arrest, however, Mr. Zywicki once again left the grounds of the Court. Id. The repeated threats of arrest have caused Mr. Zywicki to refrain from returning to the Supreme Court grounds to exercise his rights protected by the First Amendment. Complaint ¶20 (Grace App. 6a).

Upon learning of these events, appellee Grace arrived on the Supreme Court grounds on March 17, 1980, and stood on the sidewalk near the street, a few feet away from The Washington Post and The Washington Star vending machines. Complaint ¶¶21, 22 (Grace App. 6a-7a). Ms. Grace unfolded a sign (measuring approximately four feet by two and a half feet) inscribed verbatim with the text of the First Amendment. She stood in a peaceable, orderly manner, had no intent to interfere with the Court's work, and didn't even know whether or not the Court was in session. Complaint ¶¶20-23 (Grace App. 6a-7a). Rather, "[h]er purpose was to communicate the message of the First Amendment in a public place

peculiarly suited for such a message." Complaint ¶23 (Grace App. 7a)(emphasis added).

Shortly after noon, a Supreme Court officer, appellant Drexhagen, ordered Ms. Grace to leave the grounds of the Court, citing 40 United States Code. Complaint ¶24 (Grace App. 7a). Ms. Grace asked the officer if he had read her sign and, if so, why she had to move, stating that she had as much right as the newspapers to be present. Complaint ¶25 (Grace App. 7a). Officer Drexhagen informed Ms. Grace that she would have to follow him inside the building if she refused to move and, fearing arrest, she left the Court grounds. Complaint ¶26 (Grace App. 7a).

Both Mr. Zywicki and Ms. Grace are eager to exercise their First Amendment rights on the Court grounds and would return but for the spectre of arrest. Complaint ¶27 (Grace App. 7a). On May 13, 1980, appellees filed a Complaint in the district court seeking injunctive and declaratory relief. Complaint (Grace App. 1a-10a). Appellees Grace and Zywicki challenged 40 U.S.C. §13k on First and Fifth Amendment grounds both on its face and as applied.

The parties filed cross-motions for summary judgment, in support of which the government filed an affidavit of Marshal Wong who stated that no expressive activity is allowed on the grounds of the Court (Grace App. 38a). The motions for a preliminary injunction and for summary judgment were argued in the district court on June 11, 1980 (Grace App. 39a-57a). During this hearing, the government conceded that §13k, by its terms, renders unlawful the placing and maintaining of newspaper vending machines on the Court grounds (Grace App. 51a-56a).

Although none of the parties presented or argued the issue, the district court dismissed the complaint for failure to exhaust

administrative remedies, holding that Ms. Grace and Mr. Zywicki should have applied to the Marshal for a permit.[2/] As noted at n.1, supra, the government has never advanced the rationale of the district court, arguing instead that an absolute ban on expressive activity on Supreme Court grounds is consistent with the First Amendment.

The court of appeals held that the district court's holding was "plainly erroneous." Grace v. Burger (Gov't App. 5a). Since the facts of the case were undisputed and because the parties had briefed and argued the merits of §13k's constitutionality both in the district court and in the court of appeals, the appeals court reached the merits of the case and held §13k unconstitutional as repugnant to the First Amendment. Id. (Gov't App. 2a, 8a-9a & n.9). Moreover, the court of appeals found that in view of the legislative history (Grace App. 34a) and the "decades of consistently broad enforcement" (Gov't App. 28a-29a), the statute was not susceptible to a limiting construction. The court reviewed the other statutes applicable to the Court and found sufficient statutory protection of the integrity of the Court in 18 U.S.C. §1507 (Grace App. 37a). The court decidedly rejected the government's argument that "interests in order and decorum can, consistently with the First Amendment, justify a total prohibition of all expressive conduct at all times and on all of the Supreme Court grounds." (Gov't App. 29a).

Significantly, prior to oral argument before the appellate court, the court of appeals took judicial notice of a newspaper article appearing in The Washington Star on January 6, 1981 (Grace

---

2/ There are no available procedures for seeking a permit to engage in expressive activity on Supreme Court grounds. Grace v. Burger (Gov't App. 5a-8a). Moreover, Marshal Wong's Affidavit clearly states that no expressive activity on the Court's grounds is allowed (Grace App. 38a).

App. 26a), which contained a photograph and a story depicting the filming of "The First Monday in October" on the steps of the Supreme Court. (Grace App. 22a-30a). The events depicted in the Star photograph and news article were thus incorporated into the record of this case.

B. Statutes Applicable to Supreme Court Grounds

Congress has enacted several statutory provisions intended to protect the dignity and decorum of the Court, as well as to preserve the appearance of insulation from the "mob" influence. Title 18 U.S.C. §1507, the basic provisions of which were mirrored in a state statute upheld by the Court in Cox v. Louisiana, 379 U.S. 559 (1965)(Cox II), prohibits picketing or parading near a federal courthouse with the specific intent to obstruct, influence or impede the administration of justice.[3/] The court of appeals found that §1507 provided ample protection of the governmental interests in protecting the judicial system from the pressures which courthouse picketing may engender. Grace v. Burger (Gov't App. 21a-24a).

There are, in addition to §1507, several statutes specifically applicable to the Supreme Court grounds of which section 13k is a part (Grace App. 31a-33a). Title 40 U.S.C. §13a entrusts the "structural and mechanical" care of the Court to the Architect of the United States Capitol. All other duties relating to the care and custody of the Supreme Court building are delegated to the Marshal of the Supreme Court, who is deemed the "superintendent"

3/ Although Judge MacKinnon, during oral argument in the court of appeals, implied that appellee Grace's action of standing on the Court grounds with a sign inscribed with the text of the First Amendment might have violated §1507 (Grace App. 69a-70a), the record is conclusive that Ms. Grace was not attempting to influence the Court and, in fact, did not even know whether the Court was in session. Complaint ¶23 (Grace App. 7a).

of the building. 40 U.S.C §13c. Section 13f empowers the Marshal, "under the general supervision and direction of the Chief Justice," to employ special officers to police the grounds. Section 13h renders it unlawful to "offer or expose any article for sale" in the building or on the grounds or "to display any sign, placard, or other form of advertisement therein; or to solicit ... subscriptions or contributions therein." 40 U.S.C. §13h. Section 13i and g prohibit climbing upon statues, walls or fountains or disturbing the shrubs, plants or trees in the building or grounds. Section 13j prohibits the discharge of firearms, explosives or fireworks as well as prohibiting the making of any "harangue or oration" or using any "loud, threatening or abusive language" in the building or grounds.

A significant provision in the statutory scheme is §13 1 which empowers the Marshal to:

> prescribe such regulations, approved by the Chief Justice of the United States, as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds.
>
> 40 U.S.C. §13 1 (a).

Section 13 1(b) requires that any such promulgated regulation be published in a daily newspaper published in the District of Columbia, said regulations not becoming effective until ten days after publication. 40 U.S.C. §13 1(b).[4/]

4/ The only regulation promulgated under §13 1 concerns the hours during which the Court is open to the public. The Washington Star (Nov. 26, 1975); The Washington Post (Nov. 27, 1975).

The only other written policy is contained on pages 22-23 of the Supreme Court of the United States Policy Training Manual written by the S.C.U.S. Police Board in 1972 (Grace App. 40a-42a). This is not a public document and was not promulgated in accordance with §13 1. Its prohibition of distribution of leaflets or other literature on Supreme Court grounds may have provided the basis

Section 13m details the penalties for violations of section 13g through 13k, or of any regulations promulgated under §13 l, and provides that prosecutions for such offenses shall occur in the Superior Court of the District of Columbia, prosecuted by the United States Attorney. Section 13n empowers the Supreme Court police to make arrests on Supreme Court grounds for violation of any provisions of sections 13g-13k or any 13 l regulations.

Section 13o allows the Marshal to suspend application of sections 13g-13k "to permit the observance of authorized ceremonies" within the building or grounds. 40 U.S.C. §13o. Finally, section 13p defines the "grounds" of the Court basically as encompassing the block upon which the Court is located, up to the face of the curbs of the sidewalk constituting the perimeter of the grounds.

ARGUMENT

Only one skilled in the art of sophistry could seriously argue that 40 U.S.C. §13k, which not only "abridges" but altogether prohibits the exercise of pristine and time-honored First Amendment rights, is a "narrow restriction" which "does not impose a significant burden on protected speech" and which leaves open "ample alternative means" of exercise of First Amendment rights. Jur. Stmt. at 6-7. The truth is that §13k is an offense to the tradition of liberty and the ideals of democracy enshrined in the First Amendment. The all-embracing language of §13k, far from a "content neutral" regulation, has allowed the Marshal and the Supreme Court Police to administer the statute in an arbitrary and selective manner. The Washington Post is allowed to disseminate

---

4/ (cont.) for Marshal Wong's Affidavit (Grace App. 38a) that no leafletting or other expressive activity is allowed on the grounds of the Court.

its point of view with impunity, in a manner which the government has conceded is in violation of §13k (Grace App. 56a), and which is also prohibited by §13h, a provision apparently ignored by the Supreme Court Police. Moreover, the government's argument in the district court that the statute is directed even-handedly against personal conduct is belied by the Marshal's tolerance of assemblages of persons for purposes of filming a commercial movie. See appellee's Motion and the Court of Appeals Order taking Judicial Notice (Grace App. 22a-30a).

The government's arguments that §13k protects important governmental interests in preserving the sanctity, decorum and symbolic value of the Court ignores the fact that ample statutory protection of the integrity of the Court exists without application of the sweeping, selectively administered provisions of §13k. Certainly, when the Framers enacted the First Amendment they considered whether allowing expressive activity would inconvenience the three branches of government, but the First Amendment itself is testimony to the Framers' rejection of any "balancing" of pure speech rights against the interest of government in functioning in an atmosphere insulated from the views of the people.

Simply stated, the First Amendment does not allow prohibiting the pristine expressive activity involved in silent, peaceable lone leafletting or signholding where such expression is not "basically incompatible with the normal activity of [that] particular place at [that] particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). It must be remembered that appellees exercised their rights on the public sidewalk very near the street and distant from the entrance to the Court, next to the newspaper vending machines and close to a Metrobus bus stop.

The court of appeals manifestly was correct in holding §13k

violative of the First Amendment. The unpersuasive force of the government's arguments advanced in the Jurisdictional Statement do not merit further review of the Court.

1. Section 13k, on its face and as applied to appellees' activities of lone leafletting and lone signholding, constitutes a blatant violation of the First Amendment and presents a classic case of "overbreadth," in violation of the First and Fifth Amendments. The government's averment that it is a neutral regulation applied uniformly to all expression without regard to content, and that "[n]either the district court nor the court of appeals found any evidence of discriminatory enforcement" misrepresents the record and distorts common sense. Jur. Stmt. at 7.

First, during oral argument in the district court, government counsel conceded that the placing and maintenance of the newspaper vending machines violated the terms of §13k. The government argued that §13k only prohibits personal conduct and not distribution of the Post and Star via vending machines, but the district court responded:

> The Court: Mr. Lawrence, I hear you. That machine didn't walk there, it got there by somebody's personal conduct. An agent of The Washington Post put it there. Why isn't his putting it there unlawful? He is displaying a device ...
>
> Mr. Lawrence: Well, Your Honor, again ...
>
> The Court: That person has violated this statute, hasn't he, as it is written?
>
> Mr. Lawrence: It may very well be, Your Honor.
>
> The Court: How could it not be?
>
> Mr. Lawrence: I am not sure, Your Honor. I don't know how it could not be.
>
> (Grace App. 55a-56a.)

Second, the court of appeals took judicial notice that the commercial movie "First Monday in October" was filmed on the steps of the Court (Grace App. 30a). The photograph (Grace App. 26a)

obviously depicts an "assemblage" of persons in violation of the first phrase of §13k. Certainly, such an assemblage is far more disruptive of the sanctity and decorum of the Court than is a lone signholder or lone leafletter standing, not parading or picketing, on the sidewalk near the curb.

Third, the government, and apparently the Marshal and Supreme Court Police, have refrained from applying §13h's prohibition of the sale, exposure, display or solicitation of subscriptions and contributions to maintenance of the newspaper vending machines.

Fourth, the statute by its terms prohibits the display of buttons, T-shirts, lapel pins, and even the flag, on the Supreme Court grounds, yet no one could seriously argue the Supreme Court Police threaten to arrest people wearing American flag lapel pins, college T-shirts, Phi Beta Kappa pins, and other such insignia. See, Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, 586 n. 13 (D.D.C.)(three-judge court), aff'd, 409 U.S. 972 (1972).[5/]

The absolute ban on expressive activity encompassed in §13k cannot withstand First Amendment scrutiny. The sidewalk surrounding the Court is a public sidewalk with the accompanying accouterments characteristic of a public sidewalk, e.g., a Metrobus bus stop and newspaper vending machines. Such public places

---

5/ During oral argument before the court of appeals, the government admitted uncertainty whether §13k rendered unlawful the wearing of insignia type T-shirts (Grace App. 73a). This underscores the "vagueness" inhering in a statute suffering from such a degree of overbreadth that even the government attorney is unsure whether the police could arrest a group of judges standing in an "assemblage" on the Court's steps, wearing some insignia of their alma mater. If the United States Attorney is uncertain as to the reach of the statute, then no court could reasonably expect the person of ordinary intelligence to be on notice as to what §13k allows and what it forbids. Realistically, the breadth of the statute is such that, at bottom, §13k prohibits whatever the Marshal or Supreme Court Police decide it prohibits.

traditionally "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). The fact that the sidewalk at issue is part of the grounds of the Supreme Court does bring to bear certain other legitimate governmental concerns, but sufficient statutory provisions exist to accomodate these concerns without §13k's absolute prohibition.

Lone leafletting or lone signholding is not "basically incompatible" with the normal use of the Court sidewalk. Grayned v. City of Rockford, 408 U.S. 104 (1972). Nor does such activity impair the functioning of the Court.

The government argues, however, that expressive activity on the Court's grounds may impact on the public's perception of the integrity of the Court. The government maintains that a demonstration on the grounds of the Court could be seen as decisively influencing the Court regarding the subject matter of the expression. But this argument is self-defeating, as the government agrees that such a demonstration could take place across the street from the Court. Jur. Stmt. at 9. Common sense dictates that the public perception of such a demonstration's "influence" on the Court is unlikely to depend upon whether the demonstration occurs on the sidewalk of the Court or merely across the street. Moreover:

> an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.
>
> Bridges v. California, 314 U.S. 252, 270-71 (1941)(Black, J.).

The First Amendment affords virtually absolute protection to the religious and political lone leafletter. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313 (1967); Martin v. Struthers, 319 U.S. 141 (1943);

Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938). Although the Court has recognized that public safety considerations may authorize certain time, place and manner restrictions on the exercise of First Amendment rights, even the government does not argue that §13k is a time, place and manner regulation. Nor could it since the statute flatly prohibits expressive activity at any time, at any place and in any manner on the Supreme Court grounds.

Additionally, in those few instances where the government has demonstrated a compelling need to restrict expressive conduct, the Court has emphasized that "First Amendment freedoms need breathing space to survive [and] government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). Additionally, any burden upon expressive activity must be no greater than is essential to accomplish the government's legitimate interest. United States v. O'Brien, 391 U.S. 367 (1968); Shelton v. Tucker, 364 U.S. 479 (1960). As the Court instructed in Carroll v. President & Comm'rs of Princess Anne County, 393 U.S. 175, 183 (1968), statutes:

> in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.

Section 13k fails to satisfy any of the fundamental principles of Constitutional jurisprudence.

The government contends that §13k imposes but a minimal burden on appellees' First Amendment rights and that ample alternative locations exist to accomodate appellees' expressive activity. All too often the government's response to a citizen's exercise of First Amendment rights is to argue that the citizen should have gone somewhere else to exercise his or her rights. The Court,

however, has consistently rejected this distorted view of the First Amendment emphasizing that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939); Spence v. Washington, 418 U.S. 405, 411 n. 4 (1974). The mere fact that expression may inconvenience the government is insufficient to justify its absolute prohibition. "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969).

Although the Supreme Court differs functionally from the executive and legislative branches, it should not be elevated above the other branches of government for First Amendment purposes where the activity at issue bears no relation to the function or pending business of the Court. Even Cox II recognized circumstances rendering a courthouse susceptible to legitimate First Amendment activity. 379 U.S. at 567.

2. The government has asserted various interests which allegedly justify a complete ban on expressive activity, all based on the assumption that, on balance, the peculiar symbolic importance of the Court renders it immune from all First Amendment activity, no matter how innocuous the exercise of rights or whether the activity has any impact on the Court's function or pending docket. These same interests of assuring a solemn, dignified atmosphere on the Capitol grounds were rejected by the three-judge court in Jeannette Rankin, a decision which was affirmed by this Court.

These are, at best, intangible interests. The government has never introduced any evidence to support the proposition that all expressive activity threatens these interests. The government

cannot create a legitimate, compelling interest merely by stating it. Rather, the government bears the burden of producing evidence to support its claim that the activity at issue threatens a recognized interest. Larson v. Valente, No. 80-1666, 50 U.S.L.W. 4411, 4417 (U.S. April 21, 1982).

The court of appeals also rejected the government's argument that the unique character of the Court justifies a complete ban on speech, finding other statutory mechanisms fully capable of protecting these interests. The court noted:

> it would be tragic if the grounds of the Supreme Court, unquestionably the greatest protector of First Amendment rights, stood as an island of silence in which those rights could never be exercised in any form.
>
> (Gov't App. 27a).

A primary concern raised in the government's Jurisdictional Statement is that expressive activity on the grounds of the Court may cause the public to question the impartiality of the Court. In fact, the government has done far more to cause the public to question the Court's integrity by appealing the judgment below than any of appellees' activities (See Grace App. 79a-80a). In contrast to the amorphous threat to the appearance of propriety posed by appellees' conduct, the government's appeal has created actual controversy concerning the propriety of the Court deciding this case. Thus it is the government and not appellees who have created the danger of "the judicial process ... being misjudged in the minds of the public." Cox II, supra, 379 U.S. at 565.

Also, the government complains of the problems "picketing and demonstrating" on Supreme Court grounds may occasion without recognizing the authority delegated to the Marshal, subject to approval by the Chief Justice, to promulgate regulations to assure decorum and order on Court grounds. 40 U.S.C. §13 1.

Demonstrations, picketing and parading may be regulated and even lone leafletters or lone signholders are subject to the prohibitions against oratory, harangues, or loud and abusive language. 40 U.S.C. §13j. It bears noting that appellees have never argued that Supreme Court grounds are an appropriate forum for mass "demonstrations," even though the government continually focuses on the effect of "demonstrations" on Supreme Court decorum. Section 13k is an absolute ban on expression, of which a "demonstration" is but one variety. Section 13k, and the government's arguments supporting it, render a mockery of the First Amendment's clear command that Congress shall make no law abridging freedom of speech, press or religion.

The "balancing" approach employed by the government misconceives the degree of protection the First Amendment confers upon peaceful lone leafletting, signholding or distribution of religious material. Even assuming a legitimate governmental interest, Congress must regulate as narrowly as possible. Throughout this litigation the government has labelled appellees' activity as "conduct" rather than pure speech, yet, if appellees were not engaged in pure speech, then that term no longer has any meaning. Unlike the draft card burning at issue in United States v. O'Brien, 391 U.S. 367 (1968), or even the epithet at issue in Cohen v. California, 403 U.S. 15 (1971), which the Cohen dissenters characterized as "mostly conduct and little speech," appellees' activities were unquestionably mostly speech and little conduct. Certainly appellees' activity was less disruptive and more deserving of protection than the offensive language protected in Cohen.

Necessarily, exercise of one's First Amendment rights involves conduct; one must act in order to communicate, but lone leafletting

and silent, stationary signholding involve the "purest" exercise of First Amendment rights contemplated by the Constitution. In these circumstances, the "balancing" approach used by the government fails to accord the First Amendment the respect it is due. As Chief Justice Burger emphasized in a related context:

> We all seem to agree that whatever the legitimate public interest in this area, proper analysis requires us to scrutinize the precise means employed to implement that interest. The balancing test used by the Court ... has failed to give the traditional standing to some of the First Amendment values at stake here.
>
> Buckley v. Valeo, 424 U.S. 1, 238 (1976).

The government makes much of the Court's cases which have allowed restriction of First Amendment activity because the locus of the activity is inconsistent with the exercise of First Amendment rights. E.g., Greer v. Spock, 424 U.S. 828 (1976)(campaigning on military base not ordinarily open to the public); Adderly v. Florida, 385 U.S. 39 (1966)(demonstration on jailhouse driveway used exclusively for jail-related functions). But none of these cases involved lone leafletting on a public sidewalk which, like any other sidewalk, is not dedicated to a governmental function essentially at odds with free expression. Nor does Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), support the government's view since the Heffron Court found that the statute regulating distribution of religious literature did not constitute "a ban on such protected activity in the relevant public forum," but merely regulated the place and manner of distribution within the public fairgrounds. Id. at n. 16.
Unlike the above discussed cases, §13k absolutely forbids First Amendment activity in areas like the sidewalk, which are traditionally open to the public.

Aside from the First Amendment violation inhering in §13k, the statute suffers from classic overbreadth and vagueness problems, in violation of the Fifth Amendment. See part 1 supra & n. 5. Even the United States Attorney has admitted uncertainty concerning the reach and breadth of §13k (Grace App. 73a). Under these circumstances, the citizen of average intelligence can hardly be expected to be on notice as to what the law allows and what it forbids. Grayned v. City of Rockford, 408 U.S. 104 (1972). The danger of arbitrary and selective enforcement common to vague and overbroad statutes is a reality in this case. The record is replete with instances of selective enforcement. Indeed, a literal reading of the statute renders unlawful a multitude of innocent activity ranging from raising and lowering the flag on Supreme Court grounds to the wearing of college or law school T-shirts by Court personnel in the upstairs basketball court.

In sum, the First Amendment and §13k are inherently conflicting. The court of appeals was plainly correct in honoring the former rather than the latter. Upholding §13k would surely signal the dying breath of the First Amendment. Appellees are confident the Court will vindicate the interests of liberty and democracy enshrined in the First Amendment, whose very words, inscribed on appellee Grace's placard, were prohibited from view on the Supreme Court grounds.

CONCLUSION

The flagrant insult to the First Amendment posed by §13k calls for a profound statement by the Court recognizing the supremacy of the First Amendment. Appellees urge the Court to summarily affirm the judgment and opinion of the court of appeals and to issue a

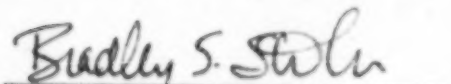
strong statement, signed by each of the Justices participating in the case, declaring $13k repugnant to the First Amendment. See Cooper v. Aaron, 358 U.S. 1 (1958).

Respectfully submitted,

MARY T. GRACE
THADDEUS ZYWICKI
By Counsel

Counsel for Appellees:

SEBASTIAN K.D. GRABER



BRADLEY S. STETLER

NORMAN A. TOWNSEND

GRABER, STETLER & TOWNSEND
1019 King Street
P.O. Box 146
Alexandria, VA 22313
(703) 548-2110

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1863

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA, et al., Appellants;

v.

MARY T. GRACE, THADDEUS ZYWICKI, Appellees.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MOTION TO PROCEED IN FORMA PAUPERIS

Appellees, by counsel, respectfully request the Court for leave to proceed on appeal in forma pauperis. Appellees are without sufficient funds to pay the costs or to give security for the expenses of the appeal. Appellees have been allowed to proceed in forma pauperis in the courts below and respectfully request the Court to grant leave to proceed in forma pauperis in the instant appeal.

Appellees' Affidavits in support of this motion are attached hereto.

Respectfully submitted,

MARY T. GRACE
THADDEUS ZYWICKI
By Counsel

Counsel for Appellees:

SEBASTIAN K.D. GRABER

BRADLEY S. STETLER

NORMAN A. TOWNSEND

GRABER, STETLER & TOWNSEND
1019 King Street
P.O. Box 146
Alexandria, VA 22313
(703) 548-2110

Certificate of Service

I hereby certify that one true and accurate copy of the foregoing appellees' Motion to Proceed In Forma Pauperis, as well as the two Affidavits in support of the motion, were mailed, postage pre-paid, to Rex E. Lee, Esq., Solicitor General of the United States, Department of Justice, Room 5143, 10th and Pennsylvania Avenues, N.W., Washington, D.C. 20530 on this 27th day of May, 1982.

SEBASTIAN K.D. GRABER

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,	:	
	:	
Appellant;	:	
	:	
v.	:	No. 81-1863
	:	
MARY T. GRACE	:	
THADDEUS ZYWICKI,	:	
	:	
Appellees.	:	

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, MARY TERESE GRACE, affirm, depose and say that I am the Appellee in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further affirm that the responses which I have made to the questions and instructions below relating to my ability to pay the cost herein are true.

1. Are you presently employed? Yes.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

      (1) Special Populations - Recreation Leader II
      Arlington County Rec. Approximately $100 per month
      900 Park Ave.
      Arlington, VA
      Beth Zeidman

(2) Graber, Stetler & Townsend – Office Maintenance
1019 King Street Approximately $40 per month
P.O. Box 146
Alexandria, VA 22313

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependant upon you for support and state your relationship to those persons.

My child, 10½ months old.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Mary Terese Grace
MARY TERESE GRACE

VIRGINIA
City of Alexandria

Subscribed and affirmed to before me on this 24th day of May, 1982.

My Commission expires: 3/25/85

Jennifer Ayers
NOTARY PUBLIC

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,	:	
	:	
Appellant;	:	
	:	
v.	:	No. 81-1863
	:	
MARY T. GRACE THADDEUS ZYWICKI,	: :	
	:	
Appellees.	:	

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, THADDEUS ZYWICKI, being first duly sworn, depose and say that I am the Appellee in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost herein are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. Stipend as missionary in 1972.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source? Yes.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. $150.00 Social Security monthly and ± $150.00 in stipends the past year.

3. Do you own any cash or checking or savings account? Yes.

   a. If the answer is yes, state the total value of the items owned. Automatic deposit of monthly Social Security $150.00 each month.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependant upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Thaddeus Zywicki
THADDEUS ZYWICKI

VIRGINIA
City of Alexandria

Subscribed and sworn to before me on this 26th day of May, 1982.

Geneva D. Harwood
NOTARY PUBLIC

My Commission expires: June 26, 1982

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1863

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA, et al., Appellants;

v.

MARY T. GRACE, et al., Appellees.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

APPENDIX FOR APPELLEES

SEBASTIAN K.D. GRABER
BRADLEY S. STETLER
Counsel for Appellees

GRABER, STETLER & TOWNSEND
1019 King Street
P.O. Box 146
Alexandria, VA 22313
(703) 548-2110

Appendix

TABLE OF CONTENTS

Page

Appendix A:

Complaint, Grace v. Burger, No. 80-1025 (D.D.C. filed May 13, 1980) 1a
Exhibit #1 to Complaint (handbill distributed by Thaddeus Zywicki in May 1978) 11a
Exhibit #2 to Complaint (handbill distributed by Thaddeus Zywicki on January 8, 1980) 12a
Exhibit #3 to Complaint (United States v. Ebner, No. 12487-79, Transcript of Proceedings 1, 36-43 (D.C. Super. Ct. January 22, 1980)(Hannon, J.)) 13a

Appendix B:

Motion Requesting the Court of Appeals to take Judicial Notice of Newspaper Article. . . 22a
Newspaper article appearing in The Washington Star, C1, C3 (January 6, 1981) 26a
Order of Court of Appeals taking Judicial Notice of Washington Star article of January 6, 1981. . . . . 30a

Appendix C:

40 U.S.C. §§13a-13p (1976) 31a
Legislative History of 40 U.S.C. §13k 1949 U.S. Code & Cong. Serv. 1827. . . . . 34a
18 U.S.C. §1507 (1976) 37a

Appendix D:

Declaration of Alfred Wong (Marshal of the Supreme Court)(Exhibit 1 to Defendants Motion for Summary Judgment) 38a
Excerpts of Transcript of Proceedings in the District Court (June 11, 1980). 39a
Excerpts of Transcript of Oral Argument to the Court of Appeals (May 27, 1981) 58a

Appendix E:

Newspaper article, The Long Island Newsday (April 1982) 79a
Newspaper article, The Boston Globe (April 12, 1982). 80a

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY TERESE GRACE
4818 N. 22nd Road
Arlington, Virginia
(703) 524-4587,

THADDEUS ZYWICKI
414 N. Edgewood Street
Arlington, Virginia
(703) 528-3204,

Plaintiffs;

v.

Civil Action No._____

WARREN E. BURGER,
Chief Justice of the
United States Supreme
Court
Supreme Court of the
United States,

SERVE: The Honorable
Warren E. Burger
Chief Justice of the
Supreme Court of the
United States
1 First Street, N.E.
Washington, D.C.,

A. WONG,
Marshal of the United
States Supreme Court

SERVE: A. Wong
Marshal of the Supreme
Court of the United
States
I First Street, N.E.
Washington, D.C.,

JAMES ZAGAMI,
Captain United States
Supreme Court Police

SERVE: JAMES ZAGAMI
Captain, United States
Supreme Court Police
1 First Street, N.E.
Washington, D.C.,

JOHN H. DEREXHAGEN,
Badge Number 5
Officer, United States
Supreme Court Police

SERVE: John H. Derexhagen
Badge No. 5
United States Supreme
Court Police
United States Supreme
Court
1 First Street, N.E.
Washington, D.C.,

COMPLAINT

MOTION FOR A PRELIMINARY INJUNCTION ATTACHED

UNITED STATES OF AMERICA :
:
SERVE: United States :
Attorney for the District :
of Columbia :
United States Courthouse :
3rd and Constitution :
Avenues, N.W. :
Washington, D.C.; :
:
and :
:
Attorney General of the :
United States :
Department of Justice :
Washington, D.C. :
By registered mail, :
:
Defendants; :

JURISDICTION

1. Jurisdiction of this Court is attained pursuant to 28 U.S.C. §1331(a), 1361, 2201, 2202, and the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

PARTIES

2. Plaintiff Mary Terese Grace is, and was at all times mentioned herein, a citizen of the United States and a resident of the Commonwealth of Virginia. Plaintiff Grace is a pacifist Christian concerned with the continued vitality of the First Amendment. Her legal name is Mary Grace Birch, but she is in the process of filing a petition for a change of name to Mary Terese Grace in Arlington County, Virginia.

3. Plaintiff Thaddeus Zywicki is a Catholic Missionary and a citizen of the United States and a resident of Arlington, Virginia.

4. Defendant Warren E. Burger is Chief Justice of the United States Supreme Court. His statutory duties and authority under 40 U.S.C. §13(f) include supervision and direction of the Marshal of the Supreme Court of the United States. He is sued in his official capacity.

5. Defendant A. Wong is the Marshal of the Supreme Court of the United States. His statutory duties under 40 U.S.C. §13(f) include designation of certain employees of the Supreme Court as special policepersons for duty in connection with the policing of the Supreme Court Building and grounds. Defendant Wong has supervisory authority over marshals for the Supreme Court. He is sued in his official capacity.

6. Defendant Zagami is Captain of the Supreme Court Police and has supervisory authority over them. The Supreme Court Police enforce the provisions of 40 U.S.C. §13(k). Defendant Zagami is sued in his official capacity.

7. Defendant Derexhagen is a member of the United States Supreme Court Police, Badge Number 5. He was on duty on March 17, 1980, and directed plaintiff Grace to leave the grounds of the Supreme Court. He is sued in his official capacity.

8. The United States is a federal sovereign amenable to suit for equitable relief against federal officers acting in their official capacities pursuant to 28 U.S.C. §1331(a), as amended, (1976), and the theory of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

NATURE OF ACTION

9. Plaintiffs are citizens who have been threatened with arrest and ordered to desist from exercising time-honored First Amendment rights on the outside grounds of the Supreme Court of the United States. Each plaintiff went to the Supreme Court by herself or himself and acted in a peaceful, orderly fashion. Neither plaintiff had any intent to interfere with ongoing judicial proceedings or to influence the court in regard to any given case. Indeed, Plaintiff Zywicki, a lone leafletter, in several instances, was distributing a handbill which had no

relation to any function of the Supreme Court, judicial or otherwise. Plaintiff Grace, alarmed that a statute could prohibit peaceful freedom of expression on the grounds of the Supreme Court stood with a sign near the newspaper vending machines on the sidewalk in front of the Supreme Court. Her sign contained a verbatim recital of the First Amendment to the United States Constitution. For that act she was ordered to leave Supreme Court grounds.

10. Plaintiffs seek declaratory and injunctive relief protecting the rights of plaintiffs and others similarly situated to exercise their First Amendment rights on Supreme Court grounds so long as said exercise is peaceful, orderly and otherwise lawful. Plaintiffs ask this court to permanently enjoin enforcement of 40 U.S.C. §13(k) and declare it unconstitutional both on its face and as it was applied to plaintiffs' conduct.

FACTUAL STATEMENT

11. Plaintiff Zywicki has gone to the Supreme Court on several occasions to express political views unrelated to the Court's pending docket and has been ordered to leave on threat of arrest on each occasion.

12. In May of 1978 plaintiff Zywicki went by himself to the Supreme Court grounds to distribute a leaflet which was a reprint of a letter to the Editor of The Washington Post from a United States Senator dealing with the subject of removal of unfit judges from the bench. See Plaintiffs' Exhibit 1, attached.

13. Plaintiff Zywicki handed out a few leaflets to passers-by on the sidewalk in front of the Supreme Court and near the coin-operated newsstand for the Washington Star. A Supreme

Court policeperson soon approached plaintiff and informed him that plaintiff would not be permitted to pass cut leaflets on Supreme Court grounds. The officer stated that Title 40 of the Federal Code prohibited plaintiff from leafletting on Supreme Court grounds which extended to the sidewalk. Plaintiff, fearing arrest, left the Supreme Court grounds and was deterred from returning.

14. On January 8, 1980, plaintiff Zywicki returned to the Supreme Court grounds with a handful of pamphlets containing an invitation to the recipient to attend several religious meetings and events concerning the political and human rights problems of Central America. See Plaintiff's Exhibit 2, attached.

15. Soon after arriving on Supreme Court property, a Supreme Court security officer apprcached plaintiff and stated that plaintiff was prohibited from passing out leaflets on Supreme Court grounds due to a law passed by Congress. Plaintiff asked the officer if he would be arrested if he continued leafletting. When the officer responded that plaintiff would be arrested, plaintiff, fearing arrest, ceased leafletting.

16. On February 4, 1980, plaintiff Zywicki again went to the Supreme Court grounds. Plaintiff had been informed by counsel that a Superior Court judge had narrowed the application of 40 U.S.C. §13(k) to conduct performed with the specific intent of influencing, impeding, or obstructing the administration of justice. Since plaintiff wanted to distribute leaflets concerning political and human oppression in Guatamala, counsel informed plaintiff that his conduct did not fall within the scope of 13(k) as narrowed by the Honorable Judge Joseph M. Hannon of the District of Columbia Superior Court. See Plaintiffs' Exhibit 3, attached, a partial transcript of the pro-

ceedings in United States v. Ebner, No. 12487-79, appeal pending, No. 80-165.

17. On February 4, 1980, plaintiff Zywicki distributed a few handbills, see Plaintiffs' Exhibit 4, attached, and was soon approached by a Supreme Court Police Officer who stated that plaintiff could not leaflet on Supreme Court grounds and would be subject to arrest if he continued to do so.

18. Plaintiff Zywicki stated that he understood the statute had been modified by the judge. The officer called inside the Supreme Court building with a walkie-talkie and eventually a Mr. White came out and stated that the statute had not been changed and that plaintiff was subject to arrest for leafletting on the sidewalk. At the time plaintiff was warned, the parties involved were standing near the Washington Post vending machine.

19. Plaintiff Zywicki informed the officers that he did not want to be arrested and would leave although plaintiff expressed a protest that the newspapers were allowed to be sold on Supreme Court grounds while plaintiff was denied the right to distribute printed matter of his choosing. Plaintiff also asked why it wasn't illegal under the statute to raise and lower the American flag on Supreme Court grounds.

20. Fearing arrest, plaintiff Zywicki has refrained from returning to the Supreme Court grounds to exercise his rights under the First Amendment.

* * * * *

21. On March 17, 1980, Mary Terese Grace arrived at the grounds of the Supreme Court a few minutes after noon. She unfolded a sign measuring approximately four feet by two and a half feet which stated the exact words of the First Amendment to the United States Constitution.

22. Plaintiff Grace stood in a peacable, orderly manner a few feet away from the Washington Post and Washington Star vending machines.

23. Plaintiff Grace had no intent to interfere with the business of the Supreme Court. Plaintiff did not know whether the Court was even in session. Her purpose was to communicate the message of the First Amendment in a public place peculiarly suited for such a message.

24. At approximately 12:15 p.m. a Supreme Court policeperson named John H. Derexhagen (Badge No. 5) came down the Supreme Court steps to where plaintiff was standing and ordered the plaintiff to go across the street. When plaintiff asked why she had to move, the officer stated that the law required it, mentioning 40 United States Code.

25. Plaintiff Grace asked the officer if he had read her sign, and if so, why she had to move. She stated she had just as much right to be there with her sign as the newsstands had a right to be there, the presence of each being protected by the First Amendment.

26. The officer replied that the law required that she move and that if plaintiff did not want to move she would have to come with the officer inside the building. Fearing arrest, plaintiff Grace decided to leave, taking down the officer's name and badge number.

27. Both plaintiffs are eager to exercise their First Amendment rights at the Supreme Court and both would return but for the spectre of arrest.

CAUSES OF ACTION

28. The proscriptions of 40 U.S.C. §13(k) are overbroad and vague in violation of the Fifth and First Amendments. The statute is unconstitutional on its face and it operates as a prior restraint.

29. The Congressional scheme of regulations pertaining to the Supreme Court is violative of the principles of the Due Process clause which guarantee equal protection of the laws in that processions and ceremonies are allowed when authorized under 40 U.S.C. §13(o), and the American flag is raised and lowered daily on Supreme Court grounds.

30. Application of 40 U.S.C. §13(k) to plaintiffs Grace and Zywicki denied them their First and Fifth Amendment rights and constituted a prior restraint upon their expression.

CLAIM FOR RELIEF

31. Plaintiffs Zywicki and Grace ask this Court to enter judgment pursuant to 28 U.S.C. §§2201 and 2202 and order relief enjoining defendants, their employees, agents, or persons acting on their behalf from enforcing 40 U.S.C. §13(k) in any manner against any person.

A. Plaintiffs ask the Court to enter a Declaratory Judgment:

1. That plaintiffs' right to engage in peaceful, orderly exercise of First Amendment rights on Supreme Court grounds is entitled to constitutional protection.

2. That the provisions of 40 U.S.C. §13(k) are unconstitutional on their face suffering from vagueness, overbreadth, and unnecessary abridgement of First Amendment freedoms.

3. That the provisions of 40 U.S.C. §13(k) are void as constituting a prior restraint on speech in violation of the First Amendment.

4. That allowing sale of newspapers on Supreme Court Grounds while denying plaintiffs the right to express their views denied plaintiffs due process of law in violation of the Fifth Amendment's guarantee of equal treatment under the law.

5. That plaintiffs are entitled to exercise their First Amendment rights on Supreme Court grounds as long as plaintiffs are orderly and do not obstruct passage nor destroy property.

6. That application of 40 U.S.C. §13(k) to plaintiffs in the above-mentioned instances was unconstitutional in violation of the First and Fifth Amendments.

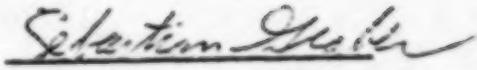
B. Plaintiffs ask this Court to enjoin defendants, their agents, employees and persons acting in their behalf from interfering with plaintiffs and others exercising their First Amendment rights to leaflet and stand with signs on the grounds of the Supreme Court so long as pedestrian and/or traffic flow is not blocked, property is not destroyed, the exercise of speech is peaceful and orderly, and the speech is not intended to influence the administration of justice with reference to any specific case pending before the Supreme Court.

C. Plaintiffs further ask this Court to enjoin defendants, their agents, employees or persons acting on their behalf from enforcing in any manner against any person the provisions of 40 U.S.C. §13(k) or any other law or regulation which is applied to prohibit activity akin to that involved in the instant case.

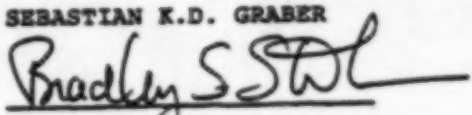
D. Plaintiffs further ask for costs for the prosecution of this lawsuit and reasonable attorneys' fees.

Respectfully submitted,

MARY TERESE GRACE
THADDEUS ŻYWICKI
Plaintiffs,
By Counsel



SEBASTIAN K.D. GRABER



BRADLEY S. STETLER

Counsel for Plaintiffs

GRABER, STETLER & TOWNSEND
101 North Columbus Street
Suite 409
Box 146
Alexandria, Virginia 22314
(703) 548-2110

VERIFICATION

We, the undersigned, verify under penalty of perjury that the foregoing Complaint, as well as the allegations of the Motion For a Preliminary Injunction are true and correct.

_____ _____

Date MARY TERESE GRACE

_____ _____

Date THADDEUS ZYWICKI

The Washington Post 11a

LETTERS TO THE EDITOR

MONDAY, MAY 1, 1978

On Removing Unfit Judges From the Federal Bench

For several years I have been an outspoken critic of the late U.S. District Judge Willis W. Ritter and of the system and tradition of American jurisprudence that effectively insulates a federal judge from all complaints and any discipline. Without surrendering the critical concept of an independent judiciary, we must establish a system that allows for impartial review and, when necessary, censure of a sitting federal judge. The Judicial Tenure Act, now pending in the Senate Judiciary Committee, provides a system of discipline within the Judicial Branch itself and it is urgently needed. The article by Clark Mollenhoff and Greg Rushford ["What Can be Done About Unfit Judges?; Only Four Have Ever Been Removed From the Federal Bench," Outlook, April 23] provided some helpful background material on the general problem, and the Ritter problem in particular.

A few months before Judge Ritter's death in March of this year, the Department of Justice and the State of Utah both petitioned the Judicial Council of the Tenth Circuit for an order barring Judge Ritter from taking any further action in any criminal or civil action in which they were a party. Those petitions were without precedent, and they were the culmination of nearly three decades of turmoil in the District Court for Utah. The petitions represented a non-partisan attempt to achieve a reasonable solution to a difficult situation in which few avenues of relief are available.

The problem with the proposed solution was that even if it had been granted it would have benefited those litigants who are best able to represent themselves in court. What about those litigants who do not have the resources of the Department of Justice or the State of Utah? Would they have been herded into Judge Ritter's court to fill the calendar dates opened when the Tenth Circuit granted the petitions of the United States and the state? If so, the individual litigant would have been appearing before a federal judge whom the Department of Justice had charged "conducts his business in a way that exceeds his authority and brings the federal courts into disrespect; neglects governing cases in the Tenth Circuit, has contempt for the judges of that court, and conducts his business in order to avoid appellate review of his decisions; and conducts the business of his court in a manner which has destroyed public confidence in his ability to administer justice" (*United States v. Ritter*, Petition for Writ of Mandamus or Prohibition).

I supported the filing of the writs because they were a significant and too-long delayed step toward equal justice, but the availability of this potential remedy is not adequate to the task of judicial discipline. As a cosponsor of the Judicial Tenure Act, I trust that it will be adequate.

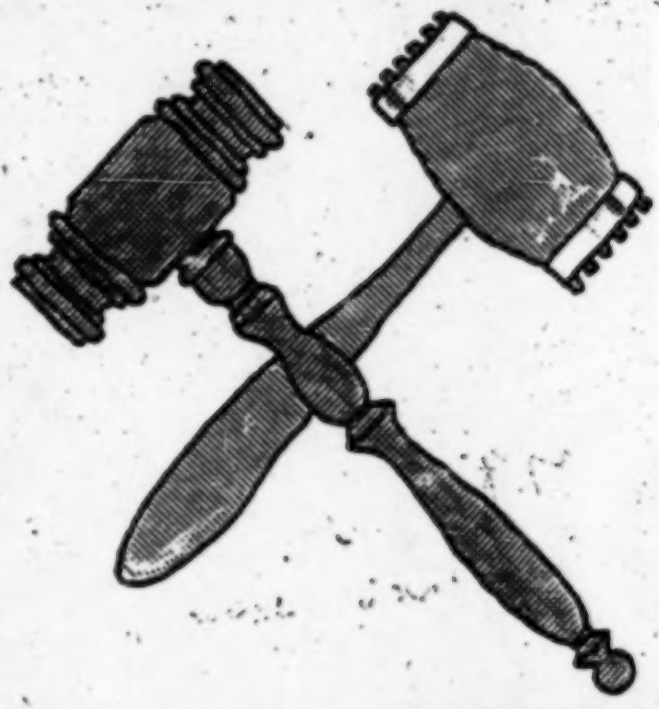
In 1821 Thomas Jefferson wrote, regarding the adoption of the Bill of Rights, that an 11th amendment should have been proposed and that, in failing to do so, the new nation had sown the seeds of its destruction. Said Jefferson:

"But there was another amendment, of which none of us thought at the time, and in the omission of which, lurks the germ that is to destroy this happy combination of National powers in the General government, for matters of National concern, and independent powers in the States, for what concerns the States severally. . . . [A]nd, in the General government in this instance, we have gone even beyond the English caution, by requiring a vote of two-thirds, in one of the Houses, for removing a Judge; a vote so impossible, where any defence is made, before men of ordinary prejudices and passions, that our Judges are effectually independent of the nation. But this ought not to be. I would not, indeed, make them dependent on the Executive authority, as they formerly were in England; but I deem it indispensable to the continuance of this government, that they should be submitted to some practical and impartial control. . . ."

The Judicial Tenure Act provides that "practical and impartial" control that Jefferson hoped to see adopted. Once again, it would be prudent to follow his advice.

JAKE GARN,
U.S. Senator (R-Utah).

Washington



By Barbe Kaufmann for The Washington Post

Exhibit #1

The Washington Post

LETTERS TO THE EDITOR

MONDAY, MAY 1, 1978

On Removing Unfit Judges From the Federal Bench

For several years I have been an outspoken critic of the late U.S. District Judge Willis W. Ritter and of the system and tradition of American jurisprudence that effectively insulates a federal judge from all complaints and any discipline. Without surrendering the critical concept of an independent judiciary, we must establish a system that allows for impartial review and, when necessary, censure of a sitting federal judge. The Judicial Tenure Act, now pending in the Senate Judiciary Committee, provides a system of discipline within the Judicial Branch itself and it is urgently needed. The article by Clark Mollenhoff and Greg Rushford ["What Can be Done About Unfit Judges?; Only Four Have Ever Been Removed From the Federal Bench," Outlook, April 23] provided some helpful background material on the general problem, and the Ritter problem in particular.

A few months before Judge Ritter's death in March of this year, the Department of Justice and the State of Utah both petitioned the Judicial Council of the Tenth Circuit for an order barring Judge Ritter from taking any further action in any criminal or civil action in which they were a party. Those petitions were without precedent, and they were the culmination of nearly three decades of turmoil in the District Court for Utah. The petitions represented a non-partisan attempt to achieve a reasonable solution to a difficult situation in which few avenues of relief are available.

The problem with the proposed solution was that even if it had been granted it would have benefited those litigants who are best able to represent themselves in court. What about those litigants who do not have the resources of the Department of Justice or the State of Utah? Would they have been herded into Judge Ritter's court to fill the calendar dates opened when the Tenth Circuit granted the petitions of the United States and the state? If so, the individual litigant would have been appearing before a federal judge whom the Department of Justice had charged "conducts his business in a way that exceeds his authority and brings the federal courts into disrespect; neglects governing cases in the Tenth Circuit, has contempt for the judges of that court, and conducts his business in order to avoid appellate review of his decisions; and conducts the business of his court in a manner which has destroyed public confidence in his ability to administer justice" (*United States v. Ritter*, Petition for Writ of Mandamus or Prohibition).

I supported the filing of the writs because they were a significant and too-long delayed step toward equal justice, but the availability of this potential remedy is not adequate to the task of judicial discipline. As a cosponsor of the Judicial Tenure Act, I trust that it will be adequate.

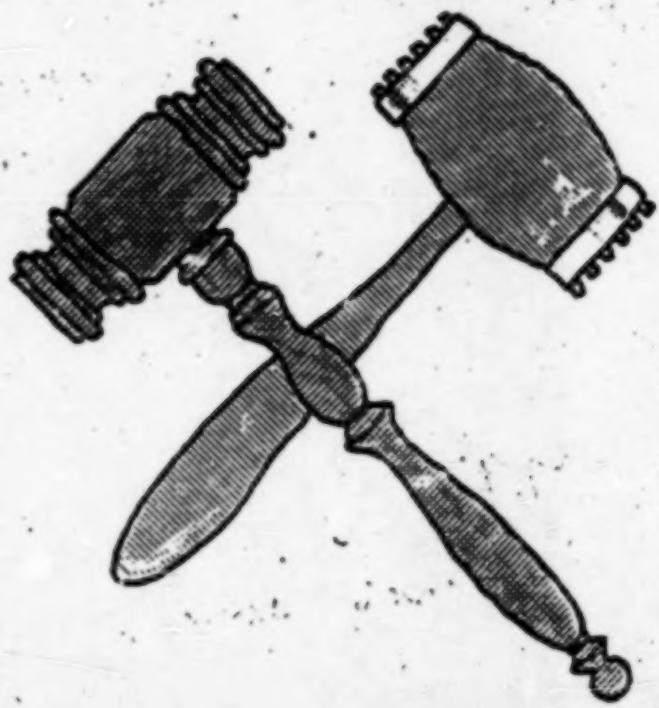
In 1821 Thomas Jefferson wrote, regarding the adoption of the Bill of Rights, that an 11th amendment should have been proposed and that, in failing to do so, the new nation had sown the seeds of its destruction. Said Jefferson:

"But there was another amendment, of which none of us thought at the time, and in the omission of which, lurks the germ that is to destroy this happy combination of National powers in the General government, for matters of National concern, and independent powers in the States, for what concerns the States severally. . . . [A]nd, in the General government in this instance, we have gone even beyond the English caution, by requiring a vote of two-thirds, in one of the Houses, for removing a Judge; a vote so impossible, where any defence is made, before men of ordinary prejudices and passions, that our Judges are effectually independent of the nation. But this ought not to be. I would not, indeed, make them dependent on the Executive authority, as they formerly were in England; but I deem it indispensable to the continuance of this government, that they should be submitted to some practical and impartial control. . . ."

The Judicial Tenure Act provides the "practical and impartial" control that Jefferson hoped to see adopted. Once again, it would be prudent to follow his advice.

JAKE GARN,
U.S. Senator (R-Utah).

Washington



By Jackie Kaufmann for The Washington Post

Exhibit #1

YOU ARE INVITED TO

A RELIGIOUS REFLECTION IN SOLIDARITY WITH OPPRESSED PEOPLES OF CENTRAL AMERICA

CHRISTIANS AROUND THE WORLD ARE JOINING IN PRAYER AND FASTING IN RESPONSE TO THE CALL OF THE CHURCHES OF CENTRAL AMERICA.

THIS IS PART OF AN INTERNATIONAL DAY OF CONCERN AND SUPPORT FOR OUR SUFFERING SISTERS AND BROTHERS.

- CAPILLA LATINA
2200 CALIFORNIA N.W.
SUNDAY
JANUARY 13, 1980
AT
1:30 P.M.

- AN ECUMENICAL SERVICE WITH SONGS AND MESSAGES FROM CHRISTIANS IN GUATEMALA, NICARAGUA, EL SALVADOR, HONDURAS.

OTHER WEEKEND SOLIDARITY EVENTS:

SATURDAY, JANUARY 12TH
7:30 P.M. -

"GUATEMALA SOLIDARITY NIGHT"

ST. STEPHEN'S CHURCH, 16TH AND NEWTON ST. N.W. -
FOR MORE INFORMATION CALL 232-4467

SUNDAY, JANUARY 13TH
7:30 P.M.

"LATIN AMERICAN SOLIDARITY NIGHT"

ALL SOULS' CHURCH
16TH AND COLUMBIA ROAD N.W.

FOR MORE INFORMATION CALL 667-0417 -

Exhibit #2

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
v.	:	
GERALD EBNER,	:	Docket No. 12487-79
WILLIAM R. DURLAND,	:	Docket No. 12490-79
EDWARD B. CASSIDY,	:	Docket No. 12491-79
WILLIAM J. HARTMAN,	:	Docket No. 12493-79
MICHAEL SILVER, and	:	Docket No. 12494-79
MARY BIRCH,	:	Docket No. 12496-79
Defendants.	:	

Washington, D. C.

Tuesday, January 22, 1980

The above-entitled cause came on for hearing before the Honorable JOSEPH M. HANNON, Associate Judge, in Courtroom No. 12, 500 Indiana Avenue, Northwest, commencing at approximately 2:03 o'clock p. m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

ROBERT CORNELL, Esquire
Assistant United States Attorney

On behalf of the Defendants:

BRADLEY STETLER, Esquire
101 North Columbus Street
Alexandria, Virginia 22314

[redacted]

Exhibit #3

if Your Honor is going to put a narrowing construction, I would just as soon that you do the simple thing, and strike the second phrase as opposed to putting an intentional thing --

THE COURT: Don't I have a responsibility as a Judge to preserve the constitutionality of the statute if I can do so consistent with the rule of law?

MR. STETLER: You do, Your Honor. If you placed with specific intent in there, Your Honor, would that strike the second phrase too?

THE COURT: We'll find out, sir.

MR. STETLER: All right. I have nothing further.

THE COURT: This matter is before the Court on a motion to dismiss a number of criminal actions which have been lodged against the defendants, Mary Birch, William Durland, William Hartman, Michael Silver, Edward Cassidy and Gerald Ebner, and more specifically, to dismiss the charge which has been lodged against these defendants charging them with unlawful parading on the United States Supreme Court grounds on November 23, 1979, and also with displaying an unlawful device upon the Supreme Court grounds on the same date.

No challenge is made by these defendants to the third charge which has been lodged against them charging

them with unlawful entry. The Court has --

MR. STETLER: May I interrupt you a second?

THE COURT: No, not until I finish, please, sir.

The defendants urge that this statute, which is found at 40 United States Code, 13(k), is facially unconstitutional, and in addition, is being unconstitutionally applied to them with respect to the conduct they engaged in on November 23, 1979.

The Court has decreed that the challenge to the application, to the so-called unconstitutional application of the statute must be held in abeyance until such time as these cases come to trial before the Court.

It seems to the Court that only after the Government has put in its case-in-chief demonstrating through witnesses testifying under oath can this Court make a judgment respecting how the United States as sovereign is applying the statute to these defendants, and so the ruling by the Court that the motion challenging the unconstitutional application of the statute to these defendants is denied, is denied without prejudice to it being reasserted at the end of the Government's case-in-chief.

The Court turns now to the second challenge made by these defendants that 40 U. S. Code, 13(k) is unconstitutional on its face, an issue that is troublesome and that has required great thought and study by the Court

in its determination regarding the appropriate ruling respecting the constitutionality of the statute.

The Court has listened to the eloquent and scholarly argument of Mr. Stetler made on behalf of these defendants and expresses its appreciation to Mr. Stetler for the quality of the argument together with a memorandum filed in support of the position that the statute is unconstitutional on its face.

A mere reading of the statute alone would appear to substantiate the challenge of unconstitutionality, but the Court is troubled, and taking the statute in two parts and dealing with Part 1 first, the statute recites, it shall be unlawful to parade, stand, or move in processions or assemblies in the Supreme Court Building or grounds.

The Court has carefully considered this portion of the statute in an attempt to conceive of a type of activity that could be engaged in by more than three or four people which would be protected conduct if it occurred on the Supreme Court grounds.

What is it that a group who might parade or stand in assemblies or move in processions, what is it that such a group might do upon the Supreme Court grounds that could be considered to be protected activity, and Mr. Stetler has urged that this would include a group of tourists or a group of newsmen and the Court finds that

not persuasive because statutes are to be construed and applied with common sense, and no right-thinking person would apply this statute to a group of newsmen or a group of tourists, both of whom clearly are invited to the Supreme Court grounds, the tourists on one hand to see and experience American jurisprudence in action, and the newsmen to acquire news for news media distribution.

Since it is difficult to conceive of any activity that a group could engage in that would be protected, it seems then that implicit in this first part of the statute is the following language, to wit, that it shall be unlawful for persons to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds with the intent to disrupt, intefere with, or impede the administration of justice, or with the intent of influencing the administration of justice.

This Court is satisfied that that language is implicit in the first part of the statute, albeit not expressly stated, and so the Court construes the first portion of the statute to include that type of intentional activity to engage in this conduct with the intent to disrupt or interfere with or impede the administration of justice or with the intent of influencing the administration of justice.

It may be that the Court of Appeals here in the

District of Columbia may conclude that the language is not implicit in the statute in which event the Court alternatively states that that language is not implicit, that language is now to be construed as including that type of an intent within its meaning.

The Court now turns to the even more difficult portion of the statute which is directed to one person or more than one person as distinguished from the first portion of the statute which is directed to group activity.

The second portion of the statute makes it unlawful to display on the Capitol grounds or in the Supreme Court Building any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement. Clearly, that language is overly broad and can encompass within it totally innocent activity, and once again, the Court is not of the view that the Congress of the United States even back in 1890 ever intended to prohibit merely this type of activity, and so this Court construes, the second portion of the statute, to include within it the language which it has applied alternatively to the first portion of the statute, and so this Court now construes, the second portion of the statute, to make it unlawful to display on the Supreme Court grounds or in the Supreme Court Building, any flag, banner, or device designed or adapted to bring into public notice any party,

organization, or movement if done with the intent to disrupt, interfere with, or impede the administration of justice, or with the intent of influencing the administration of justice.

The statute as construed by this Court is not facially unconstitutional. The motion of these defendants to dismiss the charges lodged against them under the statute as construed by the Court is denied.

Now, Mr. Stetler.

MR. STETLER: Well, in light of Your Honor's ruling, I'll withdraw that comment. However, just for purposes of getting the language straight, would we have a written opinion on this, or could we have a written opinion?

THE COURT: You can order it from the --

MR. STETLER: That's fine. It will probably go up anyhow.

THE COURT: Is the Government ordering a copy of the Court's ruling, Mr. Cornell? To my knowledge, this is the first time any Judge of this Court has construed the statute in such a fashion as I have. If memory and research serve, it appears that Judge Hess of this Court at an earlier time entered a ruling saying that the statute was not facially unconstitutional. Whether he gave any reasons for his ruling, I cannot say. If he did, I have not been able to uncover what the reasons were.

In any event, irrespective of what Judge Hess might have said, this Court's ruling stands as the rule of law to be applied in these cases.

MR. STETLER: Thank you on behalf of the defendants, Your Honor.

THE COURT: Thank you again, Mr. Stetler. I hope I wasn't too curt with you on the issue of unconstitutional application versus facially unconstitutional. There is a substantial difference, and with all due deference, I think I'm right although the day may come when you may prove them wrong.

Thank you very much.

MR. STETLER: I wish I had read Rankin a little closer.

THE COURT: All right. There are others. Why don't you take a look at Quaker Actions sometime and see whose name is on that.

MR. STETLER: I'll do that.

THE DEPUTY CLERK: Your Honor, the same ruling in all cases?

THE COURT: Same ruling in all cases.

THE DEPUTY CLERK: Thank you, Your Honor.

(Whereupon at 3:03 o'clock p. m. the proceedings in the above-entitled cause were concluded.)

o-o-o-o-o

42

REPORTER'S CERTIFICATE

I, John F. Hrozencik, an official reporter of the Superior Court of the District of Columbia, do hereby certify that I reported by stenomask, in my official capacity, the proceedings had and testimony adduced, upon the trial in the case of UNITED STATES OF AMERICA versus GERALD EBNER, Docket No. 12487-79, WILLIAM R. DURLAND, Docket No. 12490-79, EDWARD B. CASSIDY, Docket No. 12491-79, WILLIAM J. HARTMAN, Docket No. 12493-79, MICHAEL SILVER, Docket No. 12494-79, and MARY BIRCH, Docket No. 12496-79, heard in said court on January 22, 1980.

I further testify that the foregoing forty-two pages constitute the official transcript of the proceedings as taken from my oral recording.

In witness whereof I have hereunto subscribed my name this 24th day of January 1980.

Official Reporter

RECEIVED
JAN 25 PM '80
CLERK OF SUPERIOR COURT

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY T. GRACE, et al.,	:	
Appellants,	:	
v.	:	No. 80-2044
WARREN E. BURGER, et al.,	:	
Appellees.	:	

MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OR IN THE ALTERNATIVE TO SUPPLEMENT THE RECORD

Appellant plaintiff Grace respectfully moves the Court to take judicial notice of an article and photograph which appeared in The Washington Star, C1, C3, January 6, 1981 under which is a caption which reads: "Despite the chilly weather, a film crew sets up cameras on the steps of the Supreme Court to shoot a scene in 'First Monday in October.'" See Appellant's Exhibit A, attached hereto (original filed with the Court). In the alternative, appellant Grace asks the Court to order that the record be supplemented and that the article and photograph be admitted into the record, or, in the alternative, to mark the article and photograph for identification and hear agrument on its admissibility at oral argument of the case on May 27, 1981.

As grounds for this motion, appellant states as follows:

1. Publication of the article and photograph occurred while this case was pending in this Court.

2. The article and photograph depict an assemblage of persons on the steps of the Supreme Court apparently gathered for

the purpose of shooting a scene for a commercial film.

3. Appellee argued extensively in the brief for the government that a primary purpose of 40 U.S.C. §13k is to assure "the peace and dignity of the Supreme Court..." Brief for Appellee at 11.

4. The photograph is extremely relevant and supportive of appellants' selective enforcement argument and the fact that lone leafletting or lone signholding is not disruptive when compared to other assemblies on the Supreme Court grounds which occur regularly and are allowed by appellees defendants.

5. The photograph is objective evidence that 40 U.S.C. §13k is not "applied uniformly to personal conduct" as appellees argue. Brief for Appellees at 13.

6. The government cannot argue prejudice because it is their conduct which has created any prejudice, to wit: allowing a film Supreme Court steps but disallowing appellants from engaging in their activity. Appellees have thus allowed one form of expressive activity but denied another.

7. The tremendous difficulty of assembling proof of appellants' selective enforcement arguments mitigates in favor of admitting into the record the article and photograph, prepared and published by an objective source independent of all parties.

8. Rule 201(b) of the Federal Rules of Evidence provides that judicial notice may be taken of a fact:

> not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The photograph and article provide ample basis under Rule 201(b) for the Court to take judicial notice of the fact that on or about January 5, 1981, an assemblage of persons was allowed to gather on the Supreme Court grounds for purposes of shooting a scene in a movie, "First Monday in October."

9. Rule 201(b) is applicable to this Court under Rules 101 and 201(c), Federal Rules of Evidence.

WHEREFORE, the appellant moves this Court to either:

1. Take judicial notice of the fact that on or about January 5, 1981, an assemblage of persons was allowed to gather on the steps of the United States Supreme Court for purposes of shooting a scene in a commercial film, as depicted in a photograph printed in The Washington Star, C1, January 6, 1981, or in the alternative;

2. Supplement the record with orginal copies of The Washington Star, C1, January 6, 1981, to be made a part of the record in this case. Appellant-plaintiff suggests that government counsel be allowed to make any objections at the hearing scheduled for May 27, 1981, or to submit the government's views in writing shortly thereafter.

Respectfully submitted,

MARY GRACE
THADDEUS ZYWICKI

Sebastian K.D. Graber/BS

SEBASTIAN K.D. GRABER
Counsel for appellant
GRABER, STETLER & TOWNSEND
1019 King Street
P.O. Box 146
Alexandria, Virginia 22314
(703) 548-2110

The Washington Star

Comi

hington life

TUESDAY JANUARY 6, 1981

A series or shopping malls begir tomorrow i the Fashior section.

ıe New Majority

rity Leader Howard Baker.

ian for The Washington Star

Chandler, chairman

By Lois Romano
Washington Star Staff Writer

Sen. Howard Baker, R-Tenn., the new Senate Majority Leader, was guest of honor last night at an elegant, and rather large, party held at the Corcoran Gallery of Art. But he wasn't the main attraction.

With appropriate fanfare — bright lights, an army of Secret Service, and a traveling entourage — President-elect Ronald Reagan stopped by briefly to pay tribute to the man he coolly eliminated as competition during the Republican primaries last year. He also appeared to be paying his respects to the host of the party, the Times Mirror Co., which publishes the most powerful newspaper in his home state, the Los Angeles Times.

"I will be departing in a few minutes," Reagan joked the second he walked in the door, "because not only did I not wear a black-tie, but I wore a brown suit."

The real reason for Reagan's quick exit, however, was not the brown wool gabardine suit, but the long, tiring flight from Mexico, where the president-elect had spent the day meeting with Mexican President Lopez Portillo.

Reagan dismissed his trip quickly saying it was "friendly" and the basis of establishing good relations with our Southern neighbors. And on to Howard.

"I know this is more of a non-partisan tribute for all the good things Howard has done while in the Senate," said Reagan. "But I'd like to be partisan for a minute. Howard is not only great as the leader of our party, but because he did more than any one human being could do for the election of others. And that's why he's majority leader right now, and not minority leader."

Baker, visibly tickled by Reagan's appearance, thanked the president-elect for himself and his wife, Joy, and called his rise to majority leader (Republicans are in the majority in the Senate this year for the first time since 1953) "the highest point in our political lives."

"I'm absolutely delighted in being in the majority," smiled Baker. "But

Washington Star Rosemary Morrell

Despite the chilly weather, a film crew sets up cameras on the steps of the Supreme Court to shoot a scene in "First Monday in October."

Filming 'October' In January

for The Washington Post

handler, chairman

bestowed the ti-
solutely dozens
York, when he
n there. Heigh-

IDENT'S FUNC-
ot him to be
Patrick's Epis-
e Jan. 26. Ear
ll: The original
Woodward and
The President's
ond pages rich-
ith Corrections
Dynamite Duo.
nated it 'cause
student at St.
bod Bob Count
. It was fun.
E WITH THE
ES . . . Exiting
ile's snagged a
sition. Ear's
He's hopping
and Hannan,
firm here. (O
It was Hubert
and former
nd a cozy little
will nestle in
polis office, a
ance to launch
atial Thrust.
ere's the fun
to spend Brob-
to send him
he firm's Rov-
Ambassador
man Morley
d up a $250,000-
nda. Ear dube
ringerestrate
ily, foe of the
to town. Ear
ng an office of
ar leather-bar-
Forum, three
he Capitol, for
. Tomorrow:

And that's wh[illegible] ajority leader right now, and no[illegible]inority leader."

Baker, visably tickled by Reagan's appearance, thanked the president-elect for himself and his wife, Joy, and called his rise to majority leader (Republicans are in the majority in the Senate this year for the first time since 1955) "the highest point in our political lives."

"I'm absolutely delighted in being in the majority," smiled Baker. "But before I spent all my time criticizing the Democrat's policies; now I'm spending all my time scratching and fighting to get the Cabinet nominees confirmed."

In addition to being the highlight of their political life, the event was also the bright spot of her month. Mrs. Baker has spent the past three weeks in the hospital for treatment of an ulcer condition and left for only a few hours yesterday for the senator's swearing in and the party. "That's my doctor right over there," she said proudly. "It was the only way they would let me come, and I wouldn't have missed this for anything."

Partisan differences seemed to be forgotten, at least for the night, as some 400 senators, congressmen, Carter administration officials and Cabinet secretary-designates filed into the stately Corcoran Gallery, where tables were set up in the main foyer.

Some even joked about their new status, or non-status.

"What are you going to do now?" Baker asked Carter press secretary Jody Powell.

"Well, I got a couple of very good offers to lay aluminum siding, but I haven't decided which one to take yet," said Powell wryly.

"You're doing just fine," said Baker sympathetically. "Gosh, just to survive all this."

Cavalier about his fate was former Carter campaign chieftain Bob Strauss. "Sometimes you gotta play the hand they deal you," he drawled. Strauss' hand won't be too bad as he rejoins his lucrative Dallas-based law firm, which also has a Washington office.

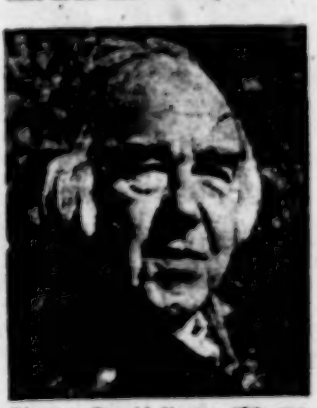
But despite a smattering of Democrats here and there, the night clearly belonged to the Republicans who hours earlier took over the U.S. Senate.

See BAKER, C-4

Despite the chilly [illegible]er, a film crew sets up cameras on the steps of the Supreme Court [illegible]oot a scene in "First Monday in October."

Actress Jill Clayburgh has her hair brushed as she braves the cold.

Actor Walter Matthau plays patty-cake in an effort to keep warm.



Director Ronald Neame: "It's supposed to be a nice sunny day."

Filming 'October' In January

By Pat Dowell
Washington Star Movie Writer

"It's cold. We know it's cold. But it's not supposed to be cold. It's supposed to be a nice sunny day," Ronald Neame mutters to one of the film crew.

On this first Monday in January — a blazingly bright, frigid morning — director Neame and his stars, Walter Matthau and Jill Clayburgh, and a couple dozen technicians who look like they're outfitted for Everest, are scaling the steps of the Supreme Court, shooting the last scene of the movie "First Monday in October."

They were here in October, when the weather was right, to film this adaptation of Jerome Lawrence and Robert E. Lee's play about the first woman Supreme Court justice. But Clayburgh's miscarriage brought a halt to the location shooting. They're back for a few days this week to shoot exteriors with the stars around the court and the Smithsonian.

The weather has added some complications. Matthau and Clayburgh are freezing to death in their autumn clothes. Clayburgh wears moonboots from the trailer to the set and then changes over into leather ankle boots, while an assistant stands by with a parka to put over her coat.

Matthau wears a rumpled (of course) sweater, with a muffler wrapped around his head, like a babushka, under his hat. He keeps dancing and sparring in place to keep warm. All they're trying to do is get out of a cab on First Street and walk up the steps to the main entrance.

They filmed the conversation inside the cab earlier this morning, riding around the block with the cab on a trailer being hauled by a pickup truck. The Panaflex camera was strapped to the hood and Neame

See ACTORS, C-3

---

is the potion that
good doctor into
This "Dr. Jekyll
2, 26 at 9), a BBC-
rter produced by
, is the first of PBS'
" series, a collec-
spy, mystery and
each presented in
pisodes.
rop is introduced
e, himself a slick
racter in many an
or movie. Con-
metic and entirely
host, Gene Shalit,
ot somnambulent.
. All that informa-
nance, and about
ople who played
m Spencer Tracy

David Hemming as Dr. Jekyll, left, and as Edward Hyde, right.

to Sylvester the Cat (an animated adaptation) — is really irrelevant.

Each new drama is shaped and colored by its adapter (in this case Gerald Savory), its director (Alastair Reid) and its star (David Hemmings), who has his own method of becoming a monster, his own diabolic combination of virtuousness and malevolence.

Savory's "Dr. J & H" is heavily, though discreetly, into S & M. Dr Jekyll's hang-up is a need for punishment — "Well, who's been a naughty boy, then?" whines one of his whores, fondling a whip. Mr. Hyde's sensuality is a lot more confident and, one would gather, sinister. "You take off all your clothes," he commands an under-

See DEVILISHLY, C-2

Actors Brave First Monday In January

Continued From C-1

spent most of his time under a large, homemade, plywood shade peering into the car's interior.

Neame, a 69-year-old Briton transplanted to Hollywood, started out as a camera operator on Alfred Hitchcock's first talkie, "Blackmail," in 1928. "Hitchcock was the boy wonder of 1928," Neame remembers, "and even then he was fat."

He worked as cinematographer with the great talents of British film-making — Michael Powell, David Lean, Anthony Asquith, among others — and became a producer for Lean on such films as "Brief Encounter" and "Great Expectations." He directed his first film in 1947, hitting his stride in the late '50s with a wonderfully acerbic adaptation of Joyce Cary's "The Horse's Mouth" and the taut military confrontations of "Tunes of Glory," both with Alec Guinness.

In 1972 he directed "The Poseidon Adventure," and that picture's success typed his work. Sitting in his director's chair on the Supreme Court steps, his wispy grey hair blowing in the 20-degree breeze, Neame gets a look of distaste. "I hated big action pictures. After 'Poseidon' everybody said it was big action pictures for Neame." He says with some relief in his voice, "But now I'm back with what I like. Action is fine. But characters are better."

"First Monday," like Neame's most recent film, "Hopscotch," combines sophisticated comedy with a topical theme — in this case, one that seems less farfetched than when the play opened at the Kennedy Center in 1977 and on Broadway the next year.

Clayburgh's character is a conservative judge who clashes with the "Great Dissenter," a flaming civil liberties champion during her 42 years in the movies? "One senses things," she says, "but it's not one's job to ask questions."

The cold eventually drives her away from the location, along with just about everyone else who can find a shelter and an excuse to use it. That includes Matthau, who spends the indoors moments between shots in one of the big trailers parked

Bracing the cold during the shooting of "First Monday in October," crew members prepare to shoot a scene that involved pulling a cab through the streets on a dolly.

Washington Star Bureau's Marvin

Matthau has no ambitions to direct. "It's too much work. You have to be so damn definite about everything. I might be that developed in about 3- to 4,000 years."

He is, however, something of a writer. "I wrote 80 percent of 'Hopscotch.' Eighty percent of the good stuff, that is. My wife (Carol Marcus), who's a writer, says I'm

[illegible] and "Great Expectations." He debuted his first film in 1947, hitting his stride in the late '50s with a wonderfully acerbic adaptation of Joyce Cary's "The Horse's Mouth" and the taut military comedy-frustrations of "Tunes of Glory," both with Alec Guinness.

In 1972 he directed "The Poseidon Adventure," and that picture's success typed his work. Sitting in his director's chair on the Supreme Court steps, his wispy gray hair blowing in the 20-degree breeze, Neame gets a look of distaste. "I hated big action pictures. After 'Poseidon' everybody said it was big action pictures for Neame." He says with some relief in his voice, "But now I'm back with what I like. Action is fine. But characters are better."

"First Monday," like Neame's most recent film, "Hopscotch," combines sophisticated comedy with a topical theme — in this case, one that seems less farfetched than when the play opened at the Kennedy Center in 1977 and on Broadway the next year.

Clayburgh's character is a conservative judge who clashes with the "Great Dissenter," a flaming civil liberties champion played by Matthau. With Ronald Reagan's election promise to appoint a woman justice to the present court, the only part of the story "that seems implausible now is the presence of an unreconstructed liberal.

In Washington and New York the leads were played by Henry Fonda and Jane Alexander. When the movie was cast, Fonda had another commitment, a film with his daughter Jane and Katharine Hepburn called "On Golden Pond," but Alexander lost the part, according to producer Barry Heller, because Clayburgh is "a much more visible star."

"At the box," someone else adds helpfully. "It's a matter of recognition," Heller says. "She's a better investment." He thinks the teaming of Matthau and Clayburgh can be likened to Hepburn and Tracy.

Heller's partner in actress Martha Scott, who's been producing plays for about 11 years. An energetic, mink-clad figure on the set, she says this is her first film production. "It's all new to me," she claims. Surely she must have picked up a few pointers during her 42 years in the movies? "One knows things," she says, "but it's not one's job to ask questions."

The cold eventually drives her away from the location, along with just about everyone else who can find a shelter and an excuse to use it. That includes Matthau, who spends the tedious moments between shots in one of the big trailers parked along Maryland Avenue, which the police have cordoned off for today's shoot.

"Henry Fonda is the best all-round American actor we have," he says with a smile. He's slouched comfortably at a table in his purring "honey wagon," kept running to provide heat. "I went to see him and asked him, 'Do you mind if I play your part?' 'Go ahead,' he said, 'you ought to do it justice.'"

Matthau is as distinctive and versatile an actor as the movies have now. That familiar, almost casually stealthy, hunched gait of his is one of film's most impressive comic accomplishments.

"That's a natural thing. It's presence," he shrugs. "It's either interesting or it's not. You can't work on it, or make it happen. In a movie a director can make you interesting, but presence is presence. It's like something Jill's character says in the movie about being a woman. It's like absolute pitch. You either have a vagina or you don't. There's no way you can buy one."

Unlike many high-paid actors these days, Matthau has no ambitions to direct. "It's too much work. You have to be so damn definite about everything. I might be that developed in about 3- to 4,000 years."

He is, however, something of a writer. "I wrote 60 percent of 'Hopscotch.' Eighty percent of the good stuff, that is. My wife (Carol Marcus), who's a writer, says I'm really a writer. She says I'm an emotional miser, just like writers are."

On the set, however, he has a reputation for friendliness and generosity. Everybody seems to find him a lovable guy, from the local actress, Wendy Taylor, who eagerly reports he got her an extra line of dialogue in her part as a taxi driver, to the director, Neame, who originally suggested Matthau for the part. The publicist loves him because he'll talk to the press and Jill Clayburgh won't.

Clayburgh doesn't like to be bothered while she works, someone on the crew elaborates, and she seems to be suffering from the cold, problems with her hair, a reluctance to have still pictures taken in judicial robes on the steps. By the time the shooting was finished yesterday, she was beginning to feel ill.

Filmmaking has never been easy, and on the first Monday in January it's tougher than ever. Tomorrow they have to figure out how to keep the simulated rainfall at the Smithsonian from freezing up.

Washington Star Photo by Harry Naltchayan

Braving the cold during the shooting of "First Monday in October," crew members prepare to shoot a scene that involved pulling a cab through the streets on a dolly.

Actress Martha Scott, co-producer of "First Monday in October"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2044

September Term, 19 80

Civil Action No. 80-01205

ARGUED: 5-27-81

Mary Terese Grace
Thaddeus Zywicki,
Appellants

v.

Warren E. Burger, Chief
Justice of the United States
Supreme Court, et al.

BEFORE: MacKinnon, Edwards and Ginsburg; Circuit Judges

O R D E R

On consideration of the motion of appellant Grace for the Court to take Judicial Notice or in the alternative to supplement the record, it is

ORDERED by the Court that the motion for the Court to take Judicial Notice is granted.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

BY: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 18 1981

GEORGE A. FISHER
CLERK

§§ 2 to 5. Omitted.

CODIFICATION

Sections 2 to 5, acts Feb. 26, 1925, ch. 339, §§ 1–4, 43 Stat. 981; July 3, 1930, ch. 848, 46 Stat. 907; 1933 Ex. Ord. No. 6166, § 2, June 10, 1933; Mar. 2, 1934, ch. 38, § 1, 48 Stat. 380, related to the abolition of the commission in charge of the State, War, and Navy Department Buildings and of the Office of Public Buildings and Grounds; to the establishment of the Office of Public Buildings and Public Parks of the National Capital; and to the transfer of officers, employees, functions, records, etc., of the abolished agencies to that agency.

The Office of Public Buildings and Public Parks of the National Capital was abolished, and its functions were transferred to the National Park Service, by Ex. Ord. No. 6166, § 2, June 10, 1933, set out as a note under section 901 of Title 5, Government Organization and Employees.

The functions of the National Park Service in the District of Columbia in connection with general assignment of space, etc., were transferred to the Public Buildings Administration in the Federal Works Agency by 1939 Reorg. Plan No. I, §§ 201, 303, eff. July 1, 1939, 4 F. R. 2729, 53 Stat. 1426, 1427, set out in the Appendix to Title 5.

For abolishment of the Federal Works Agency and the Public Buildings Administration, and transfer of functions thereof, see section 793 of this title.

§ 5a. Repealed. Oct. 31, 1951, ch. 654, § 1 (73), 65 Stat. 704.

Section, act July 19, 1932, ch. 510, 47 Stat. 706, which related to employment of landscape architects, architects, engineers, artists, etc., in connection with public buildings in the National Capital, is now covered by section 734 of this title.

§ 6. Laws not affected by creation of Office of Public Buildings and Public Parks of National Capital.

CODIFICATION

Section, act Feb. 26, 1925, ch. 339, § 6, 43 Stat. 984, related to the Office of Public Buildings and Public Parks of the National Capital, which was abolished by Ex. Ord. No. 6166, § 2, eff. June 10, 1933, set out as a note under section 901 of Title 5, Government Organization and Employees.

§ 7. Repealed. Oct. 31, 1951, ch. 654, § 1 (74), 65 Stat. 704.

Section, act July 8, 1916, ch. 139, § 1, 40 Stat. 831, which related to distribution of building employees among various government office buildings, is now covered by section 736 of this title.

§ 7a. Repealed. June 30, 1948, ch. 758, title I, § 103 (b), 62 Stat. 1068, eff. July 1, 1949.

Section, acts June 28, 1940, ch. 448, title I, § 101, 57 Stat. 179; June 27, 1944, ch. 288, title I, § 101, 58 Stat. 287; May 3, 1945, ch. 106, title I, § 101, 59 Stat. 112; Mar. 29, 1946, ch. 113, title I, § 101, 60 Stat. 63, related to appointment of personnel by the former Commissioner of Public Buildings. The Office of Commissioner of Public Buildings was abolished by act June 30, 1949, ch. 288, title I, § 103(b), 63 Stat. 380, effective July 1, 1949. The provisions are now covered by section 758 of this title.

§§ 8 to 13. Repealed. Oct. 31, 1951, ch. 654, § 1 (75)—(80), 65 Stat. 704.

Section 8, R. S. § 1798, related to expenditures of appropriations made for repairs and improvements of public buildings and grounds in the District of Columbia.

Sections 9–13 related to the care and supervision of a number of specified office buildings in the District of Columbia. They were derived from the following acts:

Section 9—Mar. 3, 1883, ch. 128, § 1, 22 Stat. 588.

Section 10—May 22, 1900, ch. 586, § 1, 31 Stat. 210; Mar. 28, 1918, ch. 39, § 1, 40 Stat. 483; June 4, 1918, ch. 92, 40 Stat. 598.

Section 11—Mar. 28, 1918, ch. 38, § 1, 40 Stat. 480; June 4, 1918, ch. 92, 40 Stat. 598.

Section 12—May 24, 1922, ch. 199, 42 Stat. 554.

Section 13—Feb. 13, 1929, ch. 73, 45 Stat. 1250.

§ 13a. United States Supreme Court Building; structural and mechanical care; care and maintenance of grounds.

The Architect of the Capitol shall have charge of the structural and mechanical care of the United States Supreme Court Building, including the care and maintenance of the grounds, and the supplying of all mechanical furnishings and mechanical equipment for the building. The operation and maintenance of the mechanical equipment and repair of the building shall be performed under his direction and he is authorized to enter into all necessary contracts. (May 7, 1934, ch. 222, § 1, 48 Stat. 668.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 13b of this title.

§ 13b. Same; structural, mechanical, and grounds employees.

Employees required for the performance of the provisions of section 13a of this title shall be (a) appointed by the Architect of the Capitol with the approval of the Chief Justice of the United States; (b) compensated in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5; and (c) be subject to the provisions of the Act entitled "An Act for the retirement of employees in the classified civil service, and for other purposes," approved May 22, 1920, as amended. (May 7, 1934, ch. 222, § 2, 48 Stat. 668; Oct. 28, 1949, ch. 782, title XI, § 1106 (a), 63 Stat. 972.)

REFERENCES IN TEXT

The Act entitled "An Act for the retirement of employees in the classified civil service, and for other purposes," approved May 22, 1920, as amended, referred to in text, was repealed by Pub. L. 89–504, § 8(a), Sept. 6, 1966, 80 Stat. 644, and is now covered by section 8301 et seq. of Title 5, Government Organization and Employees.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted "the Classification Act of 1949" for "the Classification Act of 1923", which for purposes of codification has been translated as "chapter 51 and subchapter III of chapter 53 of title 5."

§ 13c. Same; domestic care and custody; superintendent.

All other duties and work required for the operation, domestic care, and custody of the building shall be performed under the direction of the Marshal of the Supreme Court of the United States, who shall be superintendent of the United States Supreme Court Building. (May 7, 1934, ch. 222, § 3, 48 Stat. 668; June 25, 1948, ch. 646, § 27, 62 Stat. 990.)

AMENDMENTS

1948—Act June 25, 1948, omitted provision relating to custodia, employees as it is now covered by section 672 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1948 AMENDMENT

Section 36 of act June 25, 1948, provided that the amendment of this section shall be effective as of Sept. 1, 1948.

§ 13d. Repealed. June 25, 1948, ch. 646, § 29, 62 Stat. 992, eff. Sept. 1, 1948.

Section, act May 7, 1934, ch. 222, § 4, 48 Stat. 668, related to disbursement of appropriations by the marshal, and is now covered by section 672 of Title 28, Judiciary and Judicial Procedure.

§ 13e. Care and maintenance of Oliver Wendell Holmes Garden.

After the completion and dedication of the Oliver Wendell Holmes Garden, it shall be maintained and cared for by the Architect of the Capitol in accordance with the provisions of law applicable with respect to the maintenance and care of the grounds of the United States Supreme Court Building. (Oct. 22, 1940, ch. 909, § 6, 54 Stat. 1208.)

Cross References

Maintenance and care of Supreme Court Building, see sections 13a—13c of this title and section 672 of Title 28, Judiciary and Judicial Procedure.

§ 13f. Supreme Court Building and grounds; policing; designation of special policemen.

The Marshal of the Supreme Court of the United States, under the general supervision and direction of the Chief Justice of the United States, may designate employees of the Supreme Court as special policemen, without additional compensation, for duty in connection with the policing of the Supreme Court Building and grounds and adjacent streets. (Aug. 18, 1949, ch. 479, § 1, 63 Stat. 616.)

Section Referred to in Other Sections

This section is referred to in sections 13n, 13p of this title.

§ 13g. Same; restriction of public travel.

Public travel in and occupancy of the Supreme Court grounds is restricted to the sidewalks and other paved surfaces. (Aug. 18, 1949, ch. 479, § 2, 63 Stat. 616.)

Section Referred to in Other Sections

This section is referred to in sections 13f, 13m, 13n, 13o, 13p of this title.

§ 13h. Same; sale of articles; signs; solicitation.

It shall be unlawful to offer or expose any article for sale in the Supreme Court Building or grounds; to display any sign, placard, or other form of advertisement therein; or to solicit fares, alms, subscriptions, or contributions therein. (Aug. 18, 1949, ch. 479, § 3, 63 Stat. 616.)

Section Referred to in Other Sections

This section is referred to in sections 13f, 13m, 13n, 13o, 13p of this title.

§ 13i. Same; injuries to property.

It shall be unlawful to step or climb upon, remove, or in any way injure any statue, seat, wall, fountain, or other erection or architectural feature, or any tree, shrub, plant, or turf in the Supreme Court Building or grounds. (Aug. 18, 1949, ch. 479, § 4, 63 Stat. 617.)

Section Referred to in Other Sections

This section is referred to in sections 13f, 13m, 13n, 13o, 13p of this title.

§ 13j. Same; firearms or fireworks; speeches; objectionable language.

It shall be unlawful to discharge any firearm, firework or explosive, set fire to any combustible, make any harangue or oration, or utter loud, threatening, or abusive language in the Supreme Court Building or grounds. (Aug. 18, 1949, ch. 479, § 5, 63 Stat. 617.)

Section Referred to in Other Sections

This section is referred to in sections 13f, 13m, 13n, 13o, 13p of this title.

§ 13k. Same; parades or assemblages; display of flags.

It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement. (Aug. 18, 1949, ch. 479, § 6, 63 Stat. 617.)

Section Referred to in Other Sections

This section is referred to in sections 13f, 13m, 13n, 13o, 13p of this title.

§ 13l. Same; rules and regulations; publication; effective date.

(a) In addition to the restrictions and requirements specified in sections 13g to 13k of this title, the Marshal of the Supreme Court may prescribe such regulations, approved by the Chief Justice of the United States, as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds.

(b) All regulations promulgated under the authority of this section shall be printed in one or more of the daily newspapers published in the District of Columbia, and shall not become effective until the expiration of ten days after the date of such publication. (Aug. 18, 1949, ch. 479, § 7, 63 Stat. 617.)

Section Referred to in Other Sections

This section is referred to in sections 13m, 13n, 13p of this title.

§ 13m. Same; penalties.

Whoever violates any provision of sections 13g to 13k of this title, or of any regulation prescribed under section 13l of this title, shall be fined not more than $100 or imprisoned not more than sixty days, or both, prosecution for such offenses to be had in the Superior Court of the District of Columbia, upon information by the United States Attorney or any of his assistants: *Provided*, That in any case where, in the commission of any such offense, public property is damaged in an amount exceeding $100, the period of imprisonment for the offense may be not more than five years. (Aug. 18, 1949, ch. 479, § 8, 63 Stat. 617; July 29, 1970, Pub. L. 91-385, title I, § 155(a)(3), 84 Stat. 870.)

Change of Name

"Municipal Court for the District of Columbia" was changed to "Superior Court of the District of Columbia" pursuant to Pub. L. 91-358, which provides that such change is effective the first day of the seventh calendar month which begins after July 29, 1970.

Section Referred to in Other Sections

This section is referred to in section 13p of this title.

§ 13n. Same; jurisdiction and powers of special police and Metropolitan Police force.

The special police provided for in section 13f of this title shall have the power, within the Supreme Court Building and grounds and adjacent streets, to enforce and make arrests for violations of any provision of sections 13g to 13k of this title, or

any regulation prescribed under section 13*l* of this title, or of any law of the United States or of any State or any regulation promulgated pursuant thereto: *Provided*, That the Metropolitan Police force of the District of Columbia are authorized to make arrests within the Supreme Court Building and grounds for any violations of any such laws or regulations, but such authority shall not be construed as authorizing the Metropolitan Police force, except with the consent or upon the request of the Marshal of the Supreme Court or his assistants, to enter the Supreme Court Building to make arrests in response to complaints or to serve warrants or to patrol the Supreme Court Building or grounds. (Aug. 18, 1949, ch. 479, § 9, 63 Stat. 617.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 13p of this title.

§ 13o. Same; suspension of prohibitions against use of grounds.

In order to permit the observance of authorized ceremonies within the Supreme Court Building and grounds, the Marshal of the Supreme Court of the United States may suspend for such occasions so much of the prohibitions contained in sections 13g to 13k of this title, as may be necessary for the occasion, but only if responsible officers shall have been appointed, and arrangements determined which are adequate, in the judgment of the Marshal, for the maintenance of suitable order and decorum in the proceedings, and for the protection of the Supreme Court Building and grounds and of persons and property therein. (Aug. 18, 1949, ch. 479, § 10, 63 Stat. 617.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 13p of this title.

§ 13p. Same; area of grounds.

For the purposes of sections 13*l* to 13p of this title the Supreme Court grounds shall be held to extend to the line of the face of the east curb of First Street Northeast, between Maryland Avenue Northeast and East Capitol Street; to the line of the face of the south curb of Maryland Avenue Northeast, between First Street Northeast and Second Street Northeast; to the line of the face of the west curb of Second Street Northeast, between Maryland Avenue Northeast and East Capitol Street; and to the line of the face of the north curb of East Capitol Street between First Street Northeast and Second Street Northeast. (Aug. 18, 1949, ch. 479, § 11, 63 Stat. 617.)

§ 14. Repealed. Oct. 31, 1951, ch. 654, § 1 (80), 65 Stat. 704.

Section, act Feb. 15, 1933, ch. 72, 47 Stat. 1239, related to care, maintenance, etc., of Department of Commerce buildings.

§ 14a. Care, maintenance, etc., of Bureau of Standards building.

The responsibility for the care, maintenance, and protection of the buildings occupied by the Bureau of Standards of the Department of Commerce in the District of Columbia and the disbursement of the funds appropriated therefor, together with all the machinery, tools, equipment, and supplies used or for use, in connection therewith, shall be transferred on July 1, 1936, from the office of Public Buildings and Public Parks of the National Capital to the Secretary of Commerce. (Apr. 29, 1926, ch. 195, title III, 44 Stat. 256.)

TRANSFER OF FUNCTIONS

The Office of Public Buildings and Public Parks of the National Capital was abolished, and its functions transferred to the Office of National Parks, Buildings and Reservations in the Department of the Interior, by section 2 of Ex. Ord. No. 6166, June 10, 1933, set out as a note under section 901 of Title 5, Government Organization and Employees. The latter office was designated the National Park Service by act Mar. 2, 1934, ch. 38, § 1, 48 Stat. 389, see section 1 of Title 16, Conservation, and notes thereunder.

EXCEPTIONS AS TO TRANSFER OF FUNCTIONS

Functions with respect to the operation, maintenance, and custody of the buildings occupied by the National Bureau of Standards were excepted from the transfer of functions made by 1950 Reorg. Plan No. 18, § 2, eff. July 1, 1950, 15 F. R. 3177, 64 Stat. 1270, set out as a note under section 490 of this title.

§§ 15 to 18. Repealed. Oct. 31, 1951, ch. 654, § 1 (80), (81), 65 Stat. 704.

Sections related to the care, maintenance, etc., of a number of specified office buildings in the District of Columbia. They were derived from the following acts:

Section 15—Feb. 13, 1923, ch. 72, 42 Stat. 1239.
Section 16—Apr. 4, 1930, ch. 96, title I, 46 Stat. 68.
Section 17—Feb. 13, 1923, ch. 72, 42 Stat. 1240.
Section 18—Feb. 13, 1923, ch. 72, 42 Stat. 1240.

§ 18a. Repealed. May 27, 1939, ch. 141, 46 Stat. 394.

Section, act Mar. 4, 1939, ch. 707, § 1, 45 Stat. 1628, related to the care, maintenance, etc., of Mount Weather, Virginia.

§ 19. Supervision of public buildings and grounds in District of Columbia not otherwise provided for by law; eviction of trespassers.

The Administrator of General Services shall have charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to the said Administrator of General Services, or to the officer under his direction having immediate charge of said public buildings and grounds, that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the marshal of the District of Columbia in writing of such unlawful occupation, and the said marshal shall thereupon cause the said trespasser or trespassers to be ejected from said lands, and shall restore possession of the same to the officer charged by law with the custody thereof. (R.S. § 1797; Apr. 28, 1902, ch. 594, § 1, 32 Stat. 153.)

DERIVATION

Acts Aug. 4, 1854, ch. 243, § 15, 10 Stat. 573; Mar. 2, 1867, ch. 167, § 2, 14 Stat. 466; Feb. 14, 1874, ch. 22, 18 Stat. 14.

CODIFICATION

R.S. § 1797, as amended by act Apr. 28, 1902, gave the charge of public buildings and grounds in the District of Columbia to the Chief of Engineers. The former contained only the provision that the Chief of Engineers should have charge of public buildings and grounds and ended with the words, "otherwise provided for by law." The amendatory act of 1902 added the provisions beginning with the words, "and when it shall be made to appear," etc., to the end of the section.

U. S. MERCHANT MARINE ACADEMY—GRADUATES—DEGREE OF BACHELOR OF SCIENCE

For text of Act see p. 638

Senate Report No. 797, July 28, 1949 [To accompany H. R. 242]

House Report No. 949, June 29, 1949 [To accompany H. R. 242]

The Senate Report repeats in substance the House Report.

Senate Report No. 797

THE Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 242) to provide for the conferring of the degree of bachelor of science upon graduates of the United States Merchant Marine Academy, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

This bill amends the act of May 25, 1933, as amended by Public Law 705, Seventy-ninth Congress (60 Stat. 968), which provided for the conferring of the degree of bachelor of science upon graduates of the Naval, Military, Coast Guard, and Merchant Marine Academies. The latter act provided that such degrees would be conferred on and after the date that the Merchant Marine Academy was accredited by the Association of American Universities. This association, however, has withdrawn from the field of accreditation; and, in view of the fact that it is the only association specifically named in the law to grant accreditation before degrees may be conferred, no degrees may now be conferred.

This bill merely removes from existing law any reference to the Association of American Universities; if enacted, accreditation will be made by some other official accreditation organization.

The bill is approved by the United States Maritime Commission and the Bureau of the Budget and will result in no cost to the Government.

UNITED STATES SUPREME COURT—BUILDING AND GROUNDS—POLICING

For text of Act see p. 630

Senate Report No. 719, July 18, 1949 [To accompany H. R. 4948]

House Report No. ———, ———, 1949 [To accompany H. R. 4948]

The Senate Report repeats in substance the House Report.

Senate Report No. 719

THE Committee on the Judiciary, to whom was referred the bill (H. R. 4948) relating to the policing of the building and grounds of the Supreme Court of the United States, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

LEGISLATIVE HISTORY

PURPOSE

The purpose of this bill is to provide positive statutory authority for the policing of the Supreme Court Building and grounds, defining the exact territorial limits thereof, authorizing the appointment of special police, and defining their duties and powers.

STATEMENT

The Supreme Court has occupied its present building, and the grounds adjacent thereto, since the year 1935. Continuously, since said date, the building and grounds have been policed by the building guards, commissioned as special policemen who received their authority from the Government of the District of Columbia. Until quite recently, no question was raised as to the authority of the District Commissioners to so provide the authority for said special guards or policemen. Less than a year ago, said authority of the Commissioners was questioned and they concluded that, effective December 31, 1948, they should cancel all special police commissions, including the ones for the guards for the Supreme Court Building. Since it was impracticable to pass legislation prior to December 31, 1948, which would give special authority to the Supreme Court Building guards, the District commissioners have fully cooperated by extending the authority of the special policemen now assigned to the Supreme Court Building until November 1, 1949. The law is not clear as to what authority, if any, the District Commissioners can give to the guards assigned to the Supreme Court Building, and as long as any possible question exists as to such authority. Congress should act to make the authority of such guards positive and unquestionable.

Accordingly, this bill was introduced in the Senate and a companion bill (H. R. 4948) was introduced in the House of Representatives.

This bill is patterned very largely after the law which authorized special guards to police the Capitol grounds.

The exact territorial limits to which the provisions of this bill apply is clearly defined in the bill as the building and adjacent property extending to the curb line on the streets which bound it. Various acts, such as sale of goods in the building, display of advertising, soliciting alms, injury to the building or grounds, discharging of firearms, making speeches, parading or picketing, are prohibited or regulated by the bill. The Marshal of the Supreme Court is authorized to restrict and regulate travel and occupancy of the building and adjacent grounds and to prescribe rules and regulations for the protection of said premises and the maintenance of order and decorum. The bill further authorizes the appointment of, and designation of, certain employees to be special policemen and defines their exact authority. It is not anticipated that any additional expense will be incurred by reason of provisions of this bill, and the sole and only purpose of the bill is to make a clear and positive statement in the law

of the authority which said employees have exercised over the period of the past 13 years.

CONCLUSION

In keeping with the dignity which should surround the Supreme Court of the United States and the building and grounds which house it, the committee feel that this legislation should be enacted promptly.

FISH HATCHERIES, REARING PONDS, ETC.—ESTABLISHMENT, REHABILITATION AND EXPANSION

For text of Act see p. 629

Senate Report No. 679, July 14, 1949 [To accompany H. R. 2740]

House Report No. 686, May 26, 1949 [To accompany H. R. 2740]

The Senate Report repeats in substance the House Report.

Senate Report No. 679

THE Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 2740) to establish rearing ponds and a fish hatchery at or near Millen, Ga., having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

PURPOSE OF THE BILL

The bill (H. R. 2740) as herewith amended is a combination of five bills dealing with the establishment of fish hatcheries and providing for certain studies of fish resources, all heretofore passed by the House of Representatives. The five bills referred to are:

1. H. R. 2740, which would authorize the construction of rearing ponds and a fish hatchery near Millen, Ga., at an approximate cost of $250,000;

2. H. R. 961, which would authorize construction of rearing ponds and a fish hatchery in the Upper Peninsula of Michigan, at an approximate cost of $325,000;

3. H. R. 3046, which would authorize expansion of facilities at the fish cultural station at Cape Vincent, N. Y., at an approximate cost of $70,000;

4. H. R. 2501, which would authorize a six-year study by the Fish and Wildlife Service of the depletion of the shad along the Atlantic coast at a cost of $75,000 per year (the Senate companion bill S. 1094, by Senator O'Conor, was indefinitely postponed);

5. H. J. Res. 202, which would broaden the investigation of means of eradicating the predatory sea lamprey in the Great Lakes at an estimated cost of $359,000 for the first year and $216,000 per annum thereafter for probably six additional years;

6. Also included in the bill is a Senate amendment authorizing

§ 1506. Theft or alteration of record or process; false bail

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect; or

Whoever acknowledges, or procures to be acknowledged in any such court, any recognizance, bail, or judgment, in the name of any other person not privy or consenting to the same—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770.

Library references: Obstructing Justice ⇐1, 21; C.J.S. Obstructing Justice §§ 12, 22.

Historical and Revision Notes

Revisor's Note. Based on Title 18 U.S.C., 1940 ed., § 233 (Mar. 4, 1909, c. 321, § 127, 35 Stat. 1111 [derived from R.S. § 5394]).

The term of imprisonment was reduced from 7 to 5 years, to conform the punishment with like ones for similar offenses. (See section 1503 of this title.)

Minor changes were made in phraseology. 80th Congress House Report No. 304.

Cross References

Concealment, removal or destruction of records, see section 2071 of this title.
Embezzlement or theft of records, generally, see section 641 of this title.

§ 1507. Picketing or parading

Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt. Added Sept. 23, 1950, c. 1024, Title I, § 31(a), 64 Stat. 1018.

Library references
Obstructing Justice ⇐6, 21.
C.J.S. Obstructing Justice §§ 7, 11, 22.

Legislative History: For legislative history and purpose of Act Sept. 23, 1950, see 1950 U.S.Code Cong.Service, p. 2086.

§ 1508. Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting

Whoever knowingly and willfully, by any means or device whatsoever—

(a) records, or attemp
grand or petit jury in an
jury is deliberating or vot

(b) listens to or observ
the proceedings of any g
a member in any court o
deliberating or voting—

shall be fined not m
than one year, or both

Nothing in paragraph (a)
prohibit the taking of notes by
the United States in connecti
assisting him in the performa
Aug. 2, 1956, c. 879, § 1, 70 Stat

Library references: Obstructing
§§ 7, 11, 22.

Hist

Legislative History: For legislative
tory and purpose of Act Aug. 7, 1956,

§ 1509. Obstruction of

Whoever, by threats or for
pedes, or interferes with, or w
impede, or interfere with, the
formance of duties under any
of the United States, shall be fi
not more than one year, or both

No injunctive or other civil
inal by this section shall be de
is a crime. Added Pub.L. 86-
Stat. 86.

Library references: Obstructing J
§§ 7, 11, 22.

Hist

Legislative History: For legislative
tory and purpose of Pub.L. 86-189,

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY T. GRACE, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 80-1205
WARREN E. BURGER, et al.,	)	
Defendants.	)	

DECLARATION OF ALFRED WONG

I Alfred Wong, Marshal of the Supreme Court of the United States declare under penalty of perjury as follows:

1. I am the Marshal of the Supreme Court of the United States and as such I am responsible for law enforcement policy on the grounds of the Supreme Court. This responsibility includes enforcement of 40 U.S.C. § 13(k).

2. 40 U.S.C. § 13(k) is enforced uniformly on the grounds of the Supreme Court of the United States.

3. When any person on the grounds of the Supreme Court of the United States engages in expressive conduct, including carrying a sign, passing out leaflets or participating in a demonstration, that person is notified by a law enforcement officer that the conduct is in violation of 40 U.S.C. § 13(k) and advised that unless they cease the conduct or leave the grounds of the Supreme Court of the United States they will be arrested. The person is then given a reasonable time to desist his or her conduct or leave the grounds. Those who do not cease their conduct or leave the grounds are arrested.

4. 40 U.S.C. § 13 (k) is enforced uniformly without regard to message of the expressive conduct.

Executed this 27 day of May, 1980

ALFRED WONG
Marshal of the Supreme Court

DEFENDANT'S EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MARY T. GRACE, et al.,
Plaintiffs,
vs.
WARREN E. BURGER, et al.,
Defendants.

CA 80-1205

Washington, D.C.
Wednesday, June 11, 1980

The above-entitled matter came on for hearing before the Honorable LOUIS J. OBERDORFER, United States District Judge, commencing at apporximately 2:00 p.m.

APPEARANCES:

On behalf of the Plaintiffs:

SEBASTIAN GRABER, ESQ.
BRADLEY STETLER, ESQ.

On behalf of the Defendants:

CRAIG LAWRENCE, ESQ.
ROYCE LAMBERTH, ESQ.

SYLVIA SEYMOUR
OFFICIAL COURT REPORTER

in now.

THE COURT: Do you know whether there are any interpretive regulations or --

MR. STETLER: We have the Supreme Court Police Training Manual.

THE COURT: Is that in the record?

MR. STETLER: That is not in the record. The only applicable regulation in that is the regulation that prohibits all leafleting on the Supreme Court grounds.

THE COURT: Is leafleting defined?

MR. STETLER: No, it is not.

If Your Honor will indulge me. On Page 22 and Page 23 of the Supreme Court of the United States Police Training Division Manual, promulgated by the Police Board in September of 72 --

THE COURT: Promulgated by who?

MR. STETLER: The S.C.U.S. Police Board.

THE COURT: Supreme Court Police Board?

MR. STETLER: Yes.

THE COURT: Consisting of whom?

MR. STETLER: Well, listed on the title page are Frank Hepler, Marshall, and Vernon W. Kobel, Captain.

Under Item #10; under Passes, Permits and Authorization it states -- and I quote:

"Distribution of literature. Distribution of

leaflets, handbills, throwaways or other literature on the buildings or grounds is not permitted. The distribution of such material beyond the premises is the concern of local police authority."

To the extent that this manual --

THE COURT: That is a public document.

MR. STETLER: Well, it is not a public document. In fact, we had quite a hassel trying to get hold of this. The way we got it was, we are taking one of the cases up on appeal and as an agreement with the prosecutor in that case, they said that they would allow us to look through the Police Training Manual. But we did not have public access to it.

I can tender this -- it is my only copy -- to the Court.

THE COURT: Why don't you make -- is there objection to receipt of that in the record?

MR. LAWRENCE: No, Your Honor.

THE COURT: Why don't you tender it now? Withdraw it and make a copy, and file a copy with the record as Plaintiff's Exhibit A.

MR. STETLER: I will do that.

THE COURT: Was this represented to you as the current --

MR. STETLER: I had a conference with the United

States Attorney, Susan Holms. She allowed me to review the manual in full and I xeroxed the pages that I thought were relevant. She didn't say -- I don't remember her saying that it was current, although she just got it recently -- I know that -- from the Supreme Court Police.

MR. LAWRENCE: Your Honor, if I may, we will make a determination on whether that is the current manual, and notify the Court.

THE COURT: Thank you.

MR. STETLER: More specifically; in addition to the statute, we feel that the question presented to Your Honor is whether or not the United States Government can, in effect, hang a tapestry of silence around the Supreme Court by prohibiting lone leafleting and lone sideholding unrelated to any function of the Supreme Court and not designed to influence or disrupt the Supreme Court function; and whether they can enforce such a statute against such activity when the statute is an overly broad, not a narrowly drawn regulatory statute as was upheld in Cox.

THE COURT: Suppose the statute were amended so that the words "building" or "grounds" were deleted, and in their place was "courtroom".

MR. STETLER: We feel that that would be an appropriate -- that our clients would not have to hold signs in the hallway and the courtroom.

Now, I think that the proper standards that have to be applied here are whether or not the statute is rational or irrational. We are dealing here, Your Honor, with a statute that, on it's face, restricts speech. There is no question about that.

THE COURT: What do you do with a hypothetical of the courtroom?

MR. GRABER: In a courtroom?

THE COURT: Yes.

MR. GRABER: In a courtroom there should not be picketing or leafleting.

THE COURT: All right. Or in the courthouse?

MR. GRABER: In the courthouse there should not be leafleting or picketing.

THE COURT: Who is to define the courthouse more narrowly than that relatively small area occupied by the Supreme Court? I do take judicial notice of the general lay-out of that building on that site.

MR. GRABER: All right. I think that on the sidewalk, when you are in an area of the steps, and below, on the sidewalk there to the street, that area is beyond the government's legitimate authority to control in this kind of balancing view.

THE COURT: And Congress disagrees with you.

MR. GRABER: Yes. But, Your Honor, Congress is

bound, as we all are bound, by the Constitution.

THE COURT: Yes, I am sure they enacted this and I am sure they were conscious of their oath to protect and defend the Constitution. Those people up there operate under Constitutions just as you and I do.

MR. GRABER: I understand that, but it will not be the first or the last time that Congress has overstepped it's bounds.

THE COURT: In this particular situation, the Congress has drawn a finite line, very precisely. How are you going to begin to say it is wrong, much less me?

MR. GRABER: Well, Your Honor, I mean, somebody who has read constitutional cases -- the constitutional debates -- and I have devoted a considerable amount of my time to the First Amendment study --

THE COURT: Do they talk about the relationship between the Judiciary and the sanctuary it requires to perform it's functions as distinguished from the function of the Legislature and the Executive to receive impulses from the public through all sorts of transmissions? The First Amendment has a limited application to the right of appeal to communication with the court. We impinge on your First Amendment rights when we say in order to start a case you have to file a complaint. You don't start a case by carrying a sign through here.

MR. STETLER: Well, freedom of speech is different than access to a court.

THE COURT: That's right. And in controlling access to a court, you affect speech. I would think that most devoted defenders of the First Amendment -- I'd like to include myself in that company -- recognizes the need to draw a line.

MR. GRABER: But, Your Honor, we are not dealing here with speech directed towards a judiciary function.

THE COURT: That's right.

MR. GRABER: You tell me, Your Honor, what elevates the Judiciary above the Congressional or Executive branch.

THE COURT: Not above. It has a different function.

MR. GRABER: But it is above. If the First Amendment has no application to the block of the Supreme Court, but it does to the block of the Capitol, and it does to the block of the White House, what makes the Supreme Court, the highest branch of government --

THE COURT: It doesn't say it is the highest. It has a different function. Congress doesn't guarantee the right to assemble and petition the Supreme Court.

MR. GRABER: I know.

THE COURT: The Constitution guarantees the right to assemble and petition the Congress. And this court or the court of appeals have held that the White House is a

special place for the purpose of exercising First Amendment privileges.

The Supreme Court is created by Article III, to decide cases. And Congress, in it's wisdom, instead of having the Supreme Court as it originally was, inside of the Capitol, moved it across the street. Congress, historically, is very much aware of the Supreme Court. It used to be it's landlord.

MR. GRABER: I understand, Your Honor, but the standard in this case, since we are dealing with a free speech issue, the burden has to be on the government to show compelling state interest.

From what Your Honor is saying, I hear you implying that the compelling state interest is the judicial function, but I would submit that the legislative function is as compelling an interest as the judicial function. And Jeanette Rankin has held that the Capitol was a proper place for speech activities, and the Supreme Court affirmed.

THE COURT: I am not quarrelling with the Jeanette Rankin Case or with Quaker Action as they relate to the Legislative or Executive branch. But I am saying that you don't petition the Supreme Court by marching and leafleting.

MR. GRABER: Nobody was petitioning the Supreme Court. People were exercising their free speech rights, at a place that happened to be the Supreme Court.

THE COURT: If you concede to me -- as you must -- the courtroom is a place that can be walled off from that sort of activity, you have to concede that a line has to be drawn somewhere. And as long as free speech is not impeded -- in the ultimate sense, that is -- instead of leafleting on that sidewalk you can walk across the street and leaflet -- and that regulation that you read me recognizes that right -- there is not an unbalanced interference with the First Amendment on the face of the statute.

MR. GRABER: But, Your Honor, to me there is a profound difference between exercise of any activity in a courtroom that is not in conjunction with the court proceedings; when we are outside the courthouse we are dealing with a completely different factual situation, and I don't think a line can be drawn.

THE COURT: I hear you, but I am more interested in alleged discrimination.

MR. GRABER: Your Honor, I'd also like to ask the Court how the Washington Post and Washington Star have --

THE COURT: They are not here, are they?

MR. GRABER: Pardon me?

THE COURT: They are not here?

MR. GRABER: But there is no conflict of fact about it.

THE COURT: Are you basing your claim of

discrimination on the presence of their vending machines on that sidewalk?

MR. GRABER: Yes, Your Honor. One aspect; because we say what gives the Post and the Star the monopoly on wisdom and dissemination of their particular point of view?

THE COURT: I don't want a stump speech. I need to know whether I have to decide from your papers, in a summary judgment mode, whether this statute is discriminatorily administered, in your view, to the point of violating the First Amendment because there are Washington Post vending stands there.

MR. GRABER: It is not only that.

THE COURT: Is there any other item of discrimination that you are asserting on the record?

MR. GRABER: Well, Your Honor, we would like to leave that aspect open to develop it in discovery and possibly amend the complaint.

THE COURT: So you are not now pressing for summary judgment on a discrimination issue?

MR. GRABER: Except that I feel there is enough in the record with the Post and Star presence alone, because we are dealing there with printed information and printed opinion.

THE COURT: All right.

MR. GRABER: But our clients aren't allowed to disseminate their printed opinions. And I don't see the

difference, except for the fact that our clients are people who would be passing out their printed matter, as opposed to just a machine.

Now, if the Supreme Court will set up a vending machine for our clients to disseminate their information, to put their leaflets in there, then that might give the government a stronger footing. But it seems to me that there is no presumption of constitutionality for any statute that restricts speech. The Supreme Court has said that time and time again. There is no presumption of legitimacy, and, in fact, the government must show compelling state interest to justify the statute.

THE COURT: The government, having shown a compelling state interest, then what is your burden? I am of a view, subject to being persuaded differently, that the environment and the presence of the Supreme Court is an area in which there is a compelling state interest in the use of that property, primarily, if not exclusively, for ingress and egress of persons having business before the court or to use the facilities, and that the Congress could rationally determine that persuading the public about matters before the court or not before the court by these otherwise quite legitimate devices can be prohibited in that perimeter.

You have to persuade me differently, and you haven't so far.

MR. GRABER: It appears not.

THE COURT: All right. Do you have anything more? I will let you answer the government. Anything else that you want to bring to my attention at this time?

MR. GRABER: Not at this time. Only that we would be very interested in a mini-complaint and conducting discovery according to the lines of discrimination, in terms of application of the statute.

THE COURT: Sure. I will hear you in response to the government and we will consider all that.

Mr. Lawrence?

MR. LAWRENCE: I am Craig Lawrence and I appear on behalf of the United States, as well as all the other defendants. Service is completed and I now appear on behalf of all those individuals who have been named as defendents.

I would like to address, briefly, before getting to the substance, the procedural questions with regard to amending the complaint and getting into discovery.

THE COURT: Let's see where we are now. Do you agree that we are here on cross motions for summary judgment.

MR. LAWRENCE: That is correct.

THE COURT: And on a motion for preliminary injunction?

MR. LAWRENCE: That is correct, Your Honor.

THE COURT: To which you have responded.

MR. LAWRENCE: Yes, Your Honor. Both parties have moved for summary judgment. I think one of the issues of the complaint is that the only issue they have disputed with regard to the application of the statute here is that it is unequally applied to personal conduct and to the vending machines. That is the only disputed fact. On that basis, there is nothing in the complaint and there is nothing in the disputed facts which raises discriminatory enforcement of the statute, except insofar as it applies to vending machines, and not the vending machines and personal conduct.

THE COURT: What would you say the Washington Post would say if you threw them off the corner?

MR. LAWRENCE: That is a difficult question. But I think, in terms of Broadrick against Oklahoma, that is one that we really do not have to reach.

THE COURT: What does Broadrick say on that?

MR. LAWRENCE: Basically, it requires a focus on the issues which have been presented factually to the court, rather than getting into a lot of different --

THE COURT: They do, on the record, bring my attention -- I don't know whether it is in an evidentiary way -- to the presence of a vending machine.

MR. LAWRENCE: Your Honor, we don't dispute the fact that there are vending machines on the sidewalk.

THE COURT: So, to that extent they have raised the

question of discrimination, if that is discrimination.

MR. LAWRENCE: Assuming that is discrimination; Your Honor, in point of fact, a reading of the statute does not apply to machines, but rather to personal conduct. And that is the focus.

THE COURT: The definition says:

"to display any device designed or adapted to bring into public notice any organization."

MR. LAWRENCE: Yes, Your Honor.

THE COURT: On that vending machine there must be a sign that says Washington Post.

MR. LAWRENCE: And Washington Star, Your Honor.

THE COURT: Isn't that a device designed and adapted to bringing the public notice to an organization?

MR. LAWRENCE: Your Honor, I think that a statute -- at least as it applies -- is designed to deal with conduct of persons. If, for example, a person was holding --

THE COURT: Where does it say that?

MR. LAWRENCE: One moment, Your Honor.

THE COURT: It says:

"It shall be unlawful to display therein" -- meaning in the Supreme Court building or grounds -- "any device designed or adapted to bring into public notice any organization."

That literally embraces the Washington Post, doesn't

it, and the Star?

MR. LAWRENCE: I think, reading in conjunction with the first part, it embraces personal conduct:

"It shall be unlawful to parade, stand and move in processions, et cetera."

THE COURT: That part. And then there is an "or".

MR. LAWRENCE: "Or to display therein." I read those in conjunction with another one.

THE COURT: You don't read "or" as "or"?

MR. LAWRENCE: I do read it as "or", but it is designed with a person -- "unlawful not only for a person to parade, but it is also unlawful for a person to display."

THE COURT: It doesn't say person; and a corporation is a person.

MR. LAWRENCE: That is true, Your Honor. But it says an individual rather than a corporate person. And on that basis --

THE COURT: Who said that? "It shall be unlawful to display."

MR. LAWRENCE: We obviously part company on the interpretation.

THE COURT: We can part company, but you are going off the cliff. I don't want you to do that.

"It shall be unlawful to display." How do you get that to be --

MR. LAWRENCE: By reading the statute as a whole. And its basic intent, I think if we look --

THE COURT: Forty U.S.C.

MR. LAWRENCE: Forty; yes, Your Honor.

THE COURT: The whole being what?

MR. LAWRENCE: I'm talking simply about that section. But if we are dealing with -- as I read it, with personal conduct of an individual on the grounds, rather than a vending machine, I think we would have a difficult situation had plaintiffs set their vending machine --

THE COURT: They are giving their thing.

MR. LAWRENCE: That is true. But if they set up simply a stand and left their articles there, I think we are in a different context.

THE COURT: You are not saying that -- you are not representing the police would permit that, are you?

MR. LAWRENCE: Your Honor, I don't know how the police would react to it.

THE COURT: Isn't that a problem? They did have a regulation that says what a policeman would do in that circumstance. If you were a policeman, what would you do?

MR. LAWRENCE: Your Honor, it is a difficult question. I think that brings us back to my point with Broadrick To compare the newspaper vending machines we would have to have a situation where a device was left with a stack of

pamphlets on the adjacent corner to the newspaper vending machines.

THE COURT: How do you get that out of the statute? As a matter of practice, they have allowed the Washington Post to have a machine there. The statute doesn't say that, does it?

MR. LAWRENCE: Well, Your Honor, when Congress addresses a situation like that, I don't believe that they can get into obviously all the minute permutations and combinations, and I would be frankly quite surprised whether Congress considered directly the fact of newspaper vending machines one way or the other.

But I think here the real question, as far as discriminatory enforcement, would be comparing a vending machine to another machine which provided free copies of pamphlets and not a vending machine to personal conduct.

On that basis, we believe that the statute is uniformly applied to personal conduct. And on that basis, I think from that complaint, from plaintiff's complaint, we don't have a question of any uniform enforcement against other persons, because that is not part of their complaint, and they don't dispute the fact, except as to machines.

THE COURT: Mr. Lawrence, I hear you. That machine didn't walk there, it got there by somebody's personal conduct. An agent of the Washington Post put it there. Why

isn't his putting it there unlawful? He is displaying a device. Not if he did it at night.

MR. LAWRENCE: Well, Your Honor, again --

THE COURT: That person has violated this statute, hasn't he, as it is written?

MR. LAWRENCE: It may very well be, Your Honor.

THE COURT: How could it not be?

MR. LAWRENCE: I am not sure, Your Honor. I don't know how it could not be.

THE COURT: Why don't we go on to something else?

MR. LAWRENCE: In any event, I think that aspect of their statement of genuine issues points up the fact that that is the only area of unequal application that is involved in this case.

THE COURT: Let me ask you this. If your clients, having been alerted by this complaint to the possible disparity between the treatment accorded these plaintiffs and the Washington Post, should decide to remove the Washington Post, or ask the Washington Post to remove it's stands to across the street, would that not cure the case, so far as the need for equitable relief is concerned?

MR. LAWRENCE: Assuming that would be determined to be a defect, that would be one manner in which the unequal application could be cured.

And I think, as to any other problems or allegations

the officers enforcing the statute surrounding the Supreme Court?

THE COURT: Do you think this is something that the Supreme Court itself could govern by rule?

MR. LAWRENCE: Well, Your Honor, I believe, under the statute, they have the authority to issue regulations; and further regulations, obviously, could be promulgated by the Supreme Court.

THE COURT: There aren't any now. This is just general instruction: U.S.C. Training Manual. That is hardly regulation. And they are not published. Or are they?

MR. LAWRENCE: Your Honor, I am unaware. When I came in today it was the first exposure that I had had to the Police Training Division Manual.

THE COURT: They weren't published to their attorneys.

MR. LAWRENCE: Not in the context of this case. Quite frankly, Your Honor, it hasn't come up with the context of this case.

THE COURT: The government's position is I should just grant your motion for summary judgment and deny the preliminary injunction.

MR. LAWRENCE: That is correct, Your Honor, based on the papers before the Court.

THE COURT: They don't have to show irreparable

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY TERESE GRACE-THADDEUS ZYWICKI, Appellants,	:	
v.	:	No. 80-2044
WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL., Appellees.	:	

Washington, D. C.,

Wednesday, May 27, 1981.

The above-entitled matter came on for oral argument at 9:30 o'clock a.m.

BEFORE: CIRCUIT JUDGES MacKINNON, EDWARDS and GINSBURG.

APPEARANCES:

SEBASTIAN K. D. GRABER, ESQ., Graber, Stekler & Townsend, 1019 King Street, Alexandria, Virginia 22313; on behalf of the Appellants

R. CRAIG LAWRENCE, Assistant United States Attorney, Department of Justice, Washington, D. C.; on behalf of the Appellees

- - -

P R O C E E D I N G S

THE CLERK: No. 80-2044, Mary Terese Grace and Thaddeus Zywicki v. Warren E. Burger, Chief Justice of the United States Supreme Court, et al.

Sebastian K. Graber, on behalf of the appellants, and R. Craig Lawrence, on behalf of appellees.

THE COURT: Mr. Graber, you may proceed.

ORAL ARGUMENT OF SEBASTIAN K. GRABER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GRABER: May it please the Court: I am Sebastian Graber, representing the appellants in this case.

I would review the facts, but if the Court is familiar with the facts I would directly address the merits depending on the Court's inclination.

The case involves in my view the most pristine exercise of First Amendment rights that can occur in our system, and I refer specifically to activities of appellants lone leafletting and lone signholding on the sidewalks of the Supreme Court. This activity occurred near the vending machines which are situated near the curb line in the front of the Supreme Court entrance. In other words, it was very near the street and very far away from the entrances to the Court.

I would also point out that the District Court's disposition of this case, both the government and the

plaintiffs agree, was less than the best way to deal with the case, and I think we are in agreement that this Court should reach the merits of the case and I would urge the Court to do so.

The disposition below that the appellants needed to seek a permit I think was erroneous for several reasons, one being that there was no permit system to seek, and this Circuit has repeatedly ruled that an efficacious administrative remedy must exist where one is required to exhaust it.

I would further point out that appellants attack this statute upon its face, that their conduct was of pristine First Amendment activity, that the statute is the statute directed toward the regulation of speech related activity and therefore under Broadrick v. Oklahoma and the Village of Schaumburg cases the plaintiffs had standing to challenge the statute on its face on the grounds of overbreadth, in which case the particular facts and circumstances of appellants' actions become less relevant because they can point to hypothetical applications of the statute to show that the statute had too sweeping ground and impact on First Amendment rights.

QUESTION: Mr. Graber, even if we were to agree with you, if you had no administrative remedies to exhaust, still we are a court of review. Why do you suggest that we jump to a decision on the merits, rather than remand it to

the court of first instance to decide the matter in the issue?

MR. GRABER: Your Honor, I would point to this Court's decision in the Quaker I series of cases, in which Judge Bazelon upon a similar reaching by the appellants to reach the merits pointed out that in that case the facts were not stipulated to or well established. The government in that case did not stipulate to all the facts and only stipulated to facts for purposes of preliminary injunction motion.

Here we have a factual record which is not in dispute and I think that it is fairly complete if the Court will allow and take judicial notice of the filming of "First Monday in October," which occurred on January 5, 1980, the motion I filed earlier --

QUESTION: Is that a First Amendment exercise?

MR. GRABER: I feel it is a First Amendment exercise, Your Honor. I think --

QUESTION: How do you justify that?

MR. GRABER: Well, I think the arts, films particularly are embraced within the First Amendment and that is the whole --

QUESTION: Sure they are, but when they are taking a picture of something, they aren't indulging anyone.

MR. GRABER: But it is still under the statute prohibited because the statute especially prohibits the

assemblage of persons, period, no matter what they are doing. That is why I say it is over-broad.

QUESTION: Well, we've got an assemblage of persons here, but you wouldn't have --

MR. GRABER: There is no statute prohibiting their being here and they are not doing anything --

QUESTION: But they enter the court room and they enter the Supreme Court.

MR. GRABER: But we are not talking about in the Supreme Court building. I would --

QUESTION: All you are talking about is the grounds.

MR. GRABER: That's right, Your Honor. However, the government's argument that this is somehow disruptive I point out is countered by the fact that they allow routinely such filming activities which certainly is more disruptive of the decorum --

QUESTION: They don't allow it routinely.

MR. GRABER: Well, it is not in the record, Your Honor, but it was allowed in this instance -- it was difficult for me to gather evidence on this point without standing out there on a day-to-day basis. However, the vending machines provide one example of how the statute has been violated, and I think the transcript of the preliminary injunction hearing is solid on that point. Even Mr. Lawson conceded reluctantly that it was hard to get around the

vending machines as a violation of the statute because they are a device, although he --

QUESTION: In your brief you refer to the vending machines, you refer to the flags and then you made this motion with respect to the press reports of the filing of "First Monday in October." Is it your position that discovery would be of no value with respect to your position on elective --

MR. GRABER: Well, Your Honor, I think discovery could provide a basis for a stronger record on selective enforcement, however, I think the instances in the record provide enough of an example, of concrete examples. Moreover, I would point out that the facial attack of this statute provides the basis upon which other hypothetical examples can be spoken of and addressed, and in the argument before the Court of Appeals in D.C., the District of Columbia government attorneys took the position in response to a question by one of the judges that they couldn't take a picture of the judges with their college T-shirts on because that would bring attention to an organization and would be in violation of the statute, and the government's potential application of the statute is simply so unlimited.

I would simply point out that there are many statutes which currently exist which can regulate activities on the grounds of the Supreme Court, to make sure it is

peaceful and in accordance with the dignity of the Court, and there is certainly nothing to prevent the marshals from promulgating regulations. He has authority to promulgate regulations to deal with demonstrations or any activities at the Supreme Court. And in fact it may well be that large demonstrations could be altogether prohibited.

QUESTION: How about small demonstrations?

MR. GRABER: Well, I think there we are talking about something that can be allowed and regulated in a way that is conducive both to First Amendment interests of citizens and to the fair and impartial administration of justice.

QUESTION: The same statute that governs goings on in front of this Court also governs the Supreme Court, but the Supreme Court has --

MR. GRABER: That's right, there is 1507, 18 U.S.C. 1507, which is courthouse picketing, which is you have to have the intent to influence or intimidate which in their re construction was imposed in the District of Columbia in --

QUESTION: With respect to that District of Columbia construction, does that construction read any difference at all between 1507 and 1317?

MR. GRABER: In my opinion it makes them the same. They are coterminous, in my view.

QUESTION: Where does that litigation stand at the

moment?

MR. GRABER: That case has not been decided yet. It has been argued.

QUESTION: In what posture?

MR. GRABER: It is in the D.C. Court of Appeals and was argued about a month and a half ago and the Court still has the case under advisement.

QUESTION: And what happened in the Superior Court?

MR. GRABER: In the Superior Court, Judge Harmon imposed a limited construction requiring the government to a specific intent to intimidate or influence the administration of justice, and the government thereupon filed an appeal to dismiss the specific cases and is pursuing the appeal.

QUESTION: After the limiting construction, there was no further attempt to prosecute and the appeal is on the limiting construction?

MR. GRABER: That's right. However, after the limited construction came down, my clients went back to the Supreme Court. Mr. Zywicki went on one occasion and Mr. Grace went on the next, and although Mr. Zywicki specifically mentioned the limiting construction and asked the officer to check to see if the statute had not been modified, the officer did check and a gentleman came out and said it is not changed and you are not allowed to be here, and on that day Mr. Zywicki was passing out leaflets concerning problems

in Central America, nothing to do with any Court business or Court functions, nevertheless he was ordered to leave.

So my position then is that a limiting construction on this type of statute is of no benefit and indeed cannot be imposed because the Court police who are out there on the street at the Supreme Court, they simply are not imposing a limiting construction which already has been ordered by the Court of Appeals, therefore -- and the Supreme Court in Zwicker v. Koota pointed out that in over-breadth cases that limiting construction is not proper, in a vagueness case it may be, but here we have both vagueness and over-breadth, and therefore I think that the fact that the Supreme Court continues to enforce this statute means that the limiting construction is of no use, that my clients have to be arrested and be prosecuted and if they won in criminal defense, they would be vindicated. That is hardly a way to enforce First Amendment rights.

I would also point out to the Court that the District Court's comment that this is a test case, that my clients only want to test this statute and are not personally interested in expressing views about an issue is not a correct review of the record. Mr. Zywicki went to the Supreme Court on three occasions distributing handbills about issues. He did not distribute handbills talking about this statute. Ms. Grace, who is a friend of Mr. Zywicki, when she heard about

being harassed, then she went to the Supreme Court holding a sign with the verbatim transcription of the First Amendment in order to emphasize that the very Court whose duty it is to equally enforce the First Amendment and to see that the statutes are equally protected are not doing that.

I would reserve --

QUESTION: Then it was in violation of the statute?

MR. GRABER: Her activity wasn't violation at all of --

QUESTION: That picketing was in violation of the statute.

MR. GRABER: Picketing of Mrs. Green?

QUESTION: Well, you said it was, that she was picketing because she was objecting to the actions of the Supreme Court.

MR. GRABER: Not the Supreme Court, the Supreme Court police ordering her to leave.

QUESTION: They don't allow any --

MR. GRABER: Well, Justice Burger has the ultimate authority to enforce regulations and --

QUESTION: He does?

MR. GRABER: Yes, he is the one that --

QUESTION: Where does he say that?

MR. GRABER: Down the statute, all through it -- whatever it is.

QUESTION: That he can prosecute?

MR. GRABER: He doesn't prosecute. If any regulations are promulgated, he is the final one to approve them. No regulations have been promulgated by the marshal except at times at which the Supreme Court is open to the public. The only thing that exists is regulations which are not published which say that no leaflets are allowed.

QUESTION: Counsel, you argue that these First Amendment rights that you have here can't be interfered with. But if we hold with you, we open the door with ten people doing the same thing, don't we?

MR. GRABER: No, Your Honor, because the marshal can formulate regulations requiring a permit for demonstrations in excess of one person.

QUESTION: All right, ten people acting separately.

MR. GRABER: Well, I think the Court —

QUESTION: Like the White House.

MR. GRABER: Your Honor, I think the Court is well equipped to handle situations that arise.

QUESTION: Do you think so, after reading Walker actions?

MR. GRABER: Well, Your Honor —

QUESTION: How many people did they allow in Lafayette Park? Over a thousand.

MR. GRABER: Well, I don't think that any court

would say that a thousand people can gather on the sidewalks of the Supreme Court and --

QUESTION: Well, they can submit it for legal action as far as the White House is concerned.

MR. GRABER: Well, as far as --

QUESTION: You are not challenging, i.e., the validity of 18 U.S. 1507?

MR. GRABER: No, Your Honor, I'm not.

QUESTION: That is the statute which applies to all federal courts.

MR. GRABER: That's right. I think that one section is sufficient and I think 13a through K, or whatever is the scheme, contains other aspects that are valid and --

QUESTION: But you are challenging 1507.

MR. GRABER: I am not --

QUESTION: You've got one woman here that put up a sign as a picket on the Supreme Court grounds that said "Free Speech," in your own words, attempting to call attention to the Supreme Court actions and to criticize them and publicize them. Now, that is one person and that is a violation of 1507, an attempt to intimidate the Supreme Court in the action it has taken.

MR. GRABER: I respectfully disagree with Your Honor --

QUESTION: In what respect?

MR. GRABER: because she wasn't attempting to influence the Supreme Court.

QUESTION: You said she was.

MR. GRABER: I said she was attempting to bring attention to a problem that existed --

QUESTION: Well, what's the difference?

MR. GRABER: Well, the difference is that it is not the Supreme Court yet which said that you can't emphasize free speech on the sidewalk.

QUESTION: But you --

MR. GRABER: It is Congress and Congress gave the marshal the authority to enforce it and the marshal has been enforcing it, and yet --

QUESTION: What difference is that, you have made him responsible for it.

MR. GRABER: It dictates that to the Supreme Court and then Ms. Grace goes there with a sign that says "Reverse Grace v. Burger" or "Affirm Grace v. Burger," I would agree with your honor. But standing over the sign that has the First Amendment on it does not.

I would, if the Court please, reserve the rest of my time for rebuttal, and I thank you for your patience.

Thank you.

THE COURT: Thank you.

Mr. Lawrence.

MR. LAWRENCE: I'm not sure specifically physically. They were on the grounds. It was my understanding they were not on the steps of the Capitol but they were on the grounds. There was no contention that it was doing harm, as I recall. It was doing harm to the grounds. The determination was that it destroyed the park-like atmosphere, if you will, the decorum which the government in their space urged was appropriate for the grounds of the Supreme Court.

QUESTION: The statute was declared unconstitutional on its face, not as applied to the grounds in the Jeanette Rankin case, isn't that right?

MR. LAWRENCE: That's correct. The distinction drawn by Judge McGowan was basically between the political branch of government and the other branch, a finding that it was appropriate to petition Congress and this Court's determinations in the Quaker Action Group recognize the appropriateness of demonstrations to bring grievances or other issues before the executive branch.

QUESTION: (Inaudible)

MR. LAWRENCE: If it is designed to bring to public attention virtually any issue, Your Honor.

QUESTION: (Inaudible)

MR. LAWRENCE: That's correct, Your Honor.

QUESTION: (Inaudible)

MR. LAWRENCE: Your Honor, I think the substantial

state interest, as we have stated in our brief, is to maintain the appropriate decorum of the Court.

QUESTION: (inaudible)

MR. LAWRENCE: Your Honor, I think the distinction has to be in part that to the extent you get into parsing between one demonstrator and more than one demonstrator and the various issues which the person is raising, you get into an extremely unworkable area of content discrimination and a determination on the basis of the issue or the number of peopl .

QUESTION: (inaudible)

MR. LAWRENCE: Your Honor, I ---

QUESTION: (inaudible)

MR. LAWRENCE: That's correct, Your Honor, and the decisions of the Supreme Court require a balancing, and we believe that the statute strikes the appropriate balance. We are dealing with a narrowly defined area, a building that is dedicated to a specific use, and the availability of public property to propagandize various points of view are available immediately adjacent and all over the city.

QUESTION: (inaudible)

MR. LAWRENCE: Your Honor, I think that is implicit in O'Brien, for one. You have to take a look at the statute and analyze it in light of the substantial government interest and the narrowness of the prohibitions, it itself requires a

QUESTION: Mr. Lawrence, you have stressed that there is no element of selectivity, that the statute is not affected by that but bans uniformally all expressive conduct. Do you agree with the suggestion that Mr. Graber made that a T-shirt that bears a motto saying; that if a person who stands in front of the Supreme Court with such a T-shirt is violating the statute?

MR. LAWRENCE: I'm not sure, Your Honor. I am not sure how that would be addressed, whether that --

QUESTION: Well, Harvard would take a dim view of that.

MR. LAWRENCE: Your Honor, I think that the real question here is the conduct of the individuals and the conceded application of the statute here, and under the circumstances we submit that the statute is narrowly drawn and narrowly confined to that small area as it is, is constitutional, and the decision of the court below, for different reasons, should be affirmed by this Honorable Court.

Thank you very much.

THE COURT: Thank you, Mr. Lawrence.

Mr. Graber, you have one minute remaining.

ORAL ARGUMENT OF SEBASTIAN K. GRABER, ESQ.,

ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. GRABER: One minute -- I will try and be brief if I don't get too many questions.

Regarding over-breadth, Broadrick and Schaumburg are clear that if the statute on its terms goes to speech, that attacks can be made, and I guess government counsel have not properly understood or read Brodrick. They all say that everything is conduct and in the ambit of the statute that is the end of the inquiry.

I would point out that this is not conduct of pure speech and, as Judge Wright pointed out in Woman's Strike For Peace v. Morton, that under the government's typical analysis every speech becomes conduct and that those types of distinction really aren't worth a whole lot, so we would have to look at what is occurring. And what we are talking about is passing out leaflets and standing, not picketing with the signs.

I would also point out that this is a public street. There are vending machines out there, there is a bus stop out there, and this occurred on the extreme edge of the sidewalk, not near the doors of the Supreme Court.

Regarding O'Brien, that was a symbolic speech case dealing with burning of a draft card and did not involve an over-breadth attack and it did not involve pure speech.

As far as Adderly is concerned, on the fact that it was a jail driveway which was closed to the public, only open for jail business, and that is where the demonstration occurred.

QUESTION: (inaudible)

MR. GRABER: I think there is. Anything can be distinguished, but I think the activity is dissimilar. I would say lone sign-holding as is involved in this case and the passing out of leaflets aren't virtually the same. If you are marching back and forth, that I think is a little different.

QUESTION: You have the litter problem in one that you may not have with the other.

MR. GRABER: The litter is created by the recipients, not the giver of the literature and that --

QUESTION: Well, it is initiated by the giver of the literature.

MR. GRABER: Well, that --

QUESTION: If they don't want it, they just throw it away.

MR. GRABER: That's right, and Havil v. Griffin and those cases in the thirties and forties, the Supreme Court viewed littering as not enough to justify restriction of free speech. There are laws against littering.

I would simply close, as the red light has gone on, and thank Your Honors, I am sure you will give consideration to this matter.

QUESTION: Let me ask you something. What about -- do you want to have higher limits on the area beyond the

curb?

MR. GRABER: Do you mean closer to the --

QUESTION: No, away, further away.

MR. GRABER: A higher limit on what?

QUESTION: (Inaudible)

MR. GRABER: Well, there is currently a permit system that deals with demonstrations across from the Supreme Court. I am not sure I understand your question.

QUESTION: (Inaudible)

MR. GRABER: The Capitol Police regulate --

QUESTION: And is that valid?

MR. GRABER: Well, under Capitol Police regulations lone leafletting is permitted without acquiring a permit. Only group activity requires a permit. And I would agree that group activity can be regulated by permit, so I don't think lone leafletting can be.

QUESTION: (Inaudible)

MR. GRABER: Yes, Your Honor, I do.

QUESTION: That is 1503?

MR. GRABER: That is 1503.

QUESTION: I know, but you didn't agree that the lone picketer was free speech in doing it.

MR. GRABER: I think since the sign contained the words of the First Amendment, that that would hardly fall within 1503.

QUESTION: Well, it intended something and it was directed to the Supreme Court.

MR. GRABER: I don't think that the Court was around to look at the sign out there.

QUESTION: You don't want that inference drawn from the action?

MR. GRABER: Well, I --

QUESTION: But some people might draw that, as you did.

QUESTION: (inaudible)

MR. GRABER: Congress shall make no law respecting establishment of --

QUESTION: And it was there because she was objecting to the Supreme Court, that they were violating it.

MR. GRABER: Not the Supreme Court, that Congress passed a law that was being enforced --

QUESTION: But our suit comes to the Supreme Court, it doesn't come to Congress.

MR. GRABER: Well, if the Supreme Court takes the case, then at that point in time I don't think --

QUESTION: No, no, the case right now is against the Chief Justice, the Supreme Court.

MR. GRABER: Because he is the one who has final authority to regulate --

QUESTION: And he hasn't done anything but you are

still suing him.

MR. GRABER: He is a defendant. We are not suing the Court, we are suing Justice Burger in his official capacity as supervisor of the marshal. We believe he would have the power to tell the marshal not to enforce this regulation. I don't know what Justice Burger has done --

QUESTION: That is what you say.

MR. GRABER: Obviously. Thank you.

THE COURT: Thank you, counsel.

The case is submitted.

(Whereupon, at 10:15 o'clock a.m., the case in the above-entitled matter was submitted.)

- - -

The Long Island Newsday, April, 1982

Supreme Court Appealing to Itself

Washington (UPI)—The Supreme Court, in an extraordinary move, is appealing to itself to prohibit all protests and leafleting on the grounds and sidewalks around its marble-columned building.

The unusual case raises a major conflict-of-interest question over whether the justices can rule on a dispute that so plainly involves the high court itself.

At issue is a Washington appeals court decision striking down a law that allowed Supreme Court police to arrest anyone who tried to demonstrate or pass out written material around the court building on Capitol Hill.

The appeal to the high court—written by lawyers in the solicitor general's office of the Justice Department—was filed last week on behalf of Supreme Court Marshal Alfred Wong and court Police Chief James Zagami. Technically, the justices themselves are not part of the appeal. But the marshal and court police are ultimately answerable to Chief Justice Warren Burger, and Burger himself was named as a defendant in lower courts, although he is not a party to the pending appeal.

Sparking the controversy was a 2-1 ruling in September by the U.S. Court of Appeals for the District of Columbia. The court concluded that while courts can "protect the judicial process" by placing certain restrictions on the right to demonstrate and leaflet around courthouses, they cannot flatly ban all such activity. "We believe it would be tragic if the grounds of the Supreme Court, unquestionably the greatest protector of First Amendment rights, stood as an island of silence in which those rights could never be exercised in any form," Judge Harry Edwards wrote for the appellate panel.

The high court could decide this spring whether to hear the case. If the justices conclude the dispute poses an insurmountable conflict-of-interest, they could leave the appeals court ruling intact.

The appeals court decision was a victory for Thaddeus Zywicki and Mary Teresa Grace. Zywicki, an elderly Catholic missionary, was stopped once in 1978 and twice in 1980 from distributing pamphlets on the sidewalk in front of the court. In 1980, Ms. Grace was stopped when she tried to stand on the sidewalk with a sign emblazoned with the words of the First Amendment.

The law they have challenged makes it "unlawful to parade, stand or move in processions or assemblages" around the court grounds, or to display "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement."

Edwards specifically rejected the notion that "the peace and decorum of the Supreme Court" justify such an all-out ban.

But the brief written by the Justice Department argues that there is "an alternative means of expression"—demonstrating across the street from the court—and that the government can dedicate "some of its property to symbolic uses inconsistent with public demonstrations." The high court building and grounds, located east of the Capitol grounds, should be treated, government attorneys contend, "as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, free from outside pressure and political controversy."

High court to hear appeal banning protests, leaflets from own grounds

United Press International

WASHINGTON – The Supreme Court, in an extraordinary move, is appealing to itself to prohibit all protests and leafletting on the grounds and sidewalks around its marble-columned building.

The unusual case raises a major conflict-of-interest question over whether the justices can rule on a dispute that so plainly involves the high court itself.

At issue is a Washington appeals court decision striking down a law that allowed Supreme Court police to arrest anyone who tried to demonstrate or pass out written material around the court building on Capitol Hill.

The appeal to the high court – written by lawyers in the Solicitor General's office of the Justice Department – was filed last week on behalf of Supreme Court Marshal Alfred Wong and court Police Chief James Zagami.

Technically, the justices themselves are not part of the appeal. But the marshal and court police are ultimately answerable to Chief Justice Warren Burger.

Burger himself was named as a defendant in lower courts, although he is not a party to the pending appeal.

Sparking the current controversy was a 2-1 ruling last September by the US Court of Appeals for the District of Columbia. The court concluded that although courts have a right to "protect the judicial process" by placing certain restrictions on the right to demonstrate and leaflet around courthouses, they cannot flatly ban all such activity.

"We believe it would be tragic if the grounds of the Supreme Court, unquestionably the greatest protector of First Amendment rights, stood as an island of silence in which those rights could never be exercised in any form," Judge Harry Edwards wrote for the appellate panel.

The high court could decide this spring whether to hear the case. If the justices conclude the dispute poses an insurmountable conflict-of-interest, they could simply leave the appeals court ruling intact.

That decision was a victory for Thaddeus Zywicki and Mary Terese Grace. Zywicki, an elderly Roman Catholic missionary, was stopped once in 1978 and twice in 1980 from distributing pamphlets on the sidewalk in front of the court.

In 1980, Grace was stopped when she tried to stand on the same sidewalk with a sign emblazoned with the words of the First Amendment.

They have so far successfully challenged a law, enacted by Congress, which makes it "unlawful to parade, stand or move in processions or assemblages" around the court grounds, or to display "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement."

Judge Edwards specifically rejected the notion that "the peace and decorum of the Supreme Court" justify such an all-out ban.

But the legal brief written by the Justice Department argues there is "an alternative means of expression" – demonstrating across the street from the court.

It also asserts the government can dedicate "some of its property to symbolic uses inconsistent with public demonstrations."

The high court building and grounds, located east of of the US Capitol grounds, should be treated "as a symbol of the characteristic virtues of the judicial process – calm deliberation and reflection, free from outside pressure and political controversy," government attorneys contend.

The Boston Globe, April 12, 1982

QUESTION PRESENTED

Whether 40 U.S.C. 13k, which prohibits picketing, leafleting, and demonstrating in the Supreme Court building and on its grounds, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the United States, the appellants are Alfred Wong, Marshal of the Supreme Court of the United States; James Zagami, Chief, Supreme Court Police; and John H. Drexhagen, Officer, Supreme Court Police. The appellees are Mary Terese Grace and Thaddeus Zywicki. The Chief Justice was named as a defendant in the district court and as an appellee in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	6
Argument:	
40 U.S.C. 13k is a permissible regulation of the place and manner of expression	12
A. Section 13k is a content-neutral regulation that leaves open ample alternative means of expression	12
B. Section 13k promotes important government interests and is not excessively restrictive	21
1. Within the Supreme Court grounds, Section 13k protects against real or apparent interferences with the judicial process in a way superior to 18 U.S.C. 1507	21
2. Congress may properly determine that the Supreme Court serves symbolic purposes incompatible with the manner of public expression prohibited by Section 13k	33
Conclusion	39

TABLE OF AUTHORITIES

Cases:

A Quaker Action Group v. *Morton*, 516 F.2d 717	37
Adderley v. *Florida*, 385 U.S. 39	15, 19
Berman v. *Parker*, 348 U.S. 26	35
Bridges v. *California*, 314 U.S. 252	22
Brown v. *Hartlage*, No. 80-1285 (Apr. 5, 1982)	23
Brown v. *Louisiana*, 383 U.S. 131	19

Cases—Continued Page

Cabell v. *Chavez-Salido*, No. 80-990 (Jan. 12, 1982) 34
Cantwell v. *Connecticut*, 310 U.S. 296 ..... 29, 31
Carey v. *Brown*, 447 U.S. 455 ..... 12, 17, 20, 26, 31
Clements v. *Fashing*, No. 80-1290 (June 25, 1982) .. 37
Cohen v. *California*, 403 U.S. 15 35
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 ..... 12, 13, 19, 20, 24, 35
Cox v. *Louisiana (Cox I)*, 379 U.S. 536 ..... 16, 18, 20, 22, 31
Cox v. *Louisiana (Cox II)*, 379 U.S. 559 ..... *passim*
Cox v. *New Hampshire*, 312 U.S. 569 ..... 12, 15
Craig v. *Harney*, 331 U.S. 367 22
Edwards v. *South Carolina*, 372 U.S. 229 ..... 20, 32, 37
Eisenstadt v. *Baird*, 405 U.S. 438 26
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 12
Garner v. *Louisiana*, 368 U.S. 157 32
Grayned v. *City of Rockford*, 408 U.S. 104 ..... 12, 19, 31, 32, 37
Greer v. *Spock*, 424 U.S. 828 ..... 20, 22, 23, 24, 25, 33
Gregory v. *Chicago*, 394 U.S. 111 20
Hague v. *CIO*, 307 U.S. 496 ..... 18, 21
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 ..... 7, 12, 15, 18
Herndon v. *Lowry*, 301 U.S. 242 29
Hodel v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 34
Hudgens v. *NLRB*, 424 U.S. 507 23
Jeannette Rankin Brigade v. *Chief of Capitol Police*, 342 F. Supp. 575, aff'd, 409 U.S. 972 37
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 20
Kovacs v. *Cooper*, 336 U.S. 77 ..... 12, 15
Kunz v. *New York*, 340 U.S. 290 29
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 22
Lehman v. *City of Shaker Heights*, 418 U.S. 298 ..... 20, 24
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 12
Lovell v. *Griffin*, 303 U.S. 444 29

Cases—Continued

	Page
Martin v. *City of Struthers*, 319 U.S. 141	17
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490	20, 34
Mills v. *Alabama*, 384 U.S. 214	23
Moore v. *Dempsey*, 261 U.S. 86	23
Niemotko v. *Maryland*, 340 U.S. 268	13, 28
New York v. *Ferber*, No. 81-55 (July 2, 1982)	10, 28
Nixon v. *Administrator of General Services*, 433 U.S. 425	33
Offutt v. *United States*, 348 U.S. 11	23
Oyler v. *Boles*, 368 U.S. 448	13
Pennekamp v. *Florida*, 328 U.S. 331	22
Police Department of Chicago v. *Mosley*, 408 U.S. 92	23, 31
Railway Express Agency, Inc. v. *New York*, 336 U.S. 106	31
Roe v. *Kansas*, 278 U.S. 191	33
Saia v. *New York*, 334 U.S. 558	31
Schad v. *Borough of Mount Ephraim*, 452 U.S. 61	26
Schneider v. *State*, 308 U.S. 147	16
Shuttlesworth v. *Birmingham*, 394 U.S. 147	18, 20, 28-29
Smith v. *Goguen*, 415 U.S. 566	29, 33
Spence v. *Washington*, 418 U.S. 405	35
Thornhill v. *Alabama*, 310 U.S. 88	31
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503	17
United States v. *Gettysburg Electric Ry.*, 160 U.S. 668	33
United States v. *O'Brien*, 391 U.S. 367	17, 26
United States v. *Robel*, 389 U.S. 258	32
United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548	24
United States Postal Service v. *Council of Greenburgh Civic Associations*, 453 U.S. 114	15, 19
Village of Belle Terre v. *Boraas*, 416 U.S. 1	34
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982)	31

Cases—Continued

	Page
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748	7, 12
Wood v. *Georgia*, 370 U.S. 375	22

Constitution, statutes and regulations:

United States Constitution, First Amendment	7, 9, 14, 16, 26, 31, 37, 38
Act of Aug. 18, 1949, ch. 479, 63 Stat. 616	36
5 U.S.C. 7324(a)(2)	24
18 U.S.C. 1507	4, 6, 7, 9, 26, 31
28 U.S.C. 455(a)	23
40 U.S.C. 13h	36
40 U.S.C. 13i	36
40 U.S.C. 13j	36
40 U.S.C. 13k	*passim*
13 U.S.C. 13n	3
13 U.S.C. 13p	3
D.C. R. & Regs. tit. 35, § 107 (1970)	14
D.C. Mun. Regs. tit. 35, §§ 1.1-1.6 (1975)	14

Miscellaneous:

A. Bickel, *The Least Dangerous Branch* (1962)	38
A. Meiklejohn, *Free Speech* (1948)	37
Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1 (1980)	29
Developments in the Law—Zoning, 91 Harv. L. Rev. 1427 (1978)	35
H.R. Rep. No. 814, 81st Cong., 1st Sess. (1949)	36
Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1	18, 19, 20, 32
Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970)	29
Stone, *Restrictions of Speech Because of its Contents: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978)	24
S. Rep. No. 719, 81st Cong., 1st Sess. (1949)	36

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1863

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-49a) is reported at 665 F.2d 1193. The opinion of the district court (J.S. App. 56a-68a) is reported at 524 F.Supp. 815.

JURISDICTION

The judgment of the court of appeals (J.S. App. 50a-51a) was entered on September 8, 1981, and a petition for rehearing was denied on November 12, 1981 (J.S. App. 52a). A notice of appeal (J.S. App. 70a) was filed on December 11, 1981. On February

2, 1982, Justice Brennan extended the time for docketing the appeal to and including April 9, 1982. The appeal was docketed on April 7, 1982, and the Court noted probable jurisdiction on June 21, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

STATUTORY PROVISIONS INVOLVED

40 U.S.C. 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

18 U.S.C. 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

STATEMENT

40 U.S.C. 13k prohibits the "display [of] * * * any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the Supreme Court building or on its

grounds.[1] The Marshal of the Supreme Court, who supervises the Supreme Court police in their enforcement of Section 13k (see 40 U.S.C. 13n), interprets the statute to prohibit all picketing, leafleting, and demonstrating (J.S. App. 6a-7a n.7).

On three occasions between May 1978 and February 1980, appellee Zywicki stood on the Supreme Court grounds and attempted to distribute leaflets. One leaflet concerned the removal of unfit federal judges; the others discussed Central American politics (J.S. App. 3a-4a, 57a-58a). Each time, an officer of the Supreme Court police advised Zywicki that his conduct was prohibited, and he left the Supreme Court grounds. Appellee Grace learned of these events, and in March 1980 she stood on the Supreme Court grounds with a sign, approximately four feet by two and one-half feet, that recited the words of the First Amendment. She, too, left the grounds after being warned by a Supreme Court police officer (*id.* at 4a, 56a-57a). Two months later, appellees brought this action in the United States District Court for the District of Columbia, seeking a declaration that Section 13k is unconstitutional on its face and an injunction against its enforcement (J.S. App. 4a).

The district court dismissed appellees' complaint,[2] but a divided court of appeals reversed and held Section 13k unconstitutional on its face (J.S. App. 30a).

---

[1] The Supreme Court grounds extend to the curb on each side of the square block on which the Court is situated. 40 U.S.C. 13p.

[2] The district court ruled that appellees had not exhausted their administrative remedies (J.S. App. 65a-68a). The government did not suggest this basis for decision to the district court and did not defend it in the court of appeals (see *id.* at 6a-7a).

The court of appeals stated that "whenever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest—whether that interest derives from the very nature of the property itself, or from some other source" (*id.* at 19a). The court acknowledged that "[s]ubstantial governmental interests certainly * * * justify restrictions on picketing and other forms of expression in and near courthouses" (*id.* at 20a). It noted the need to protect against "influence or domination of the judiciary by public pressure," because "arguments to courts properly are presented in official pleadings * * * not on placards" (*id.* at 21a). Moreover, the court said, Congress may protect against the danger that the public will mistakenly believe a judge's decision to have been the result of popular pressure (*ibid.*).

Nevertheless, the court of appeals declared that it "need not determine the extent to which these concerns are applicable to proceedings before the United States Supreme Court" because "these legitimate concerns are fully addressed by 18 U.S.C. 1507" (J.S. App. 21a-22a). Section 1507 makes it illegal for any person to "picket[] or parade[] in or near a building housing a court of the United States, * * * or [to] resort[] to any other demonstration in or near any such building," but only if that person acts "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing [a] judge, juror, witness, or court officer, in the discharge of his duty." The court of appeals noted (J.S. App. 23a) that the constitutionality of a state statute essentially identical to Section 1507 was upheld in *Cox* v. *Louisiana (Cox II)*, 379 U.S. 559, 560-566 (1965). Because of Section 1507,

the court of appeals could find no justification for 40 U.S.C. 13k.

The court of appeals dismissed the argument that Section 13k is a reasonable measure designed to preserve the dignity and decorum of the Nation's highest court. The court of appeals acknowledged that Congress specified this interest, in the legislative history, as a reason for enacting Section 13k and that this interest is not fully protected by Section 1507 (J.S. App. 23a). The court also acknowledged that "[u]nquestionably, the majesty of the Supreme Court building can and does instill public confidence in the important governmental functions conducted inside" (*id.* at 24a). But the court of appeals questioned whether such symbolic purposes could ever justify a regulation of expression (*ibid.*). The court then added that because "*all* expressive conduct outside the Supreme Court" could not be shown adversely [to] affect the peace and decorum of the Court," the government's interest in promoting those objectives was not sufficient to sustain Section 13k (J.S. App. 25a; emphasis in original).

The court of appeals also rejected the argument that Section 13k should be upheld because it permitted appellees to demonstrate in many other places near the Supreme Court (J.S. App. 25a). In the court's view, the availability of alternative forums was irrelevant to the constitutionality of Section 13k (J.S. App. 25a-26a).

The court of appeals said that it did not "suggest that any individual may picket or leaflet in the Supreme Court building itself" (J.S. App. 26a-27a). However, because of the "all-encompassing terms," the "decades of consistently broad enforcement," and the "slim legislative history" of Section 13k, the court refused to construe the statute more narrowly in order to avoid constitutional objections (J.S. App. 28a-

29a). The court concluded that because Section 13k "prohibits expressive conduct unrelated to any business of the Supreme Court throughout the Supreme Court grounds," it is "void on its face" (J.S. App. 27a).

Judge MacKinnon dissented from this holding. He reasoned that the activities proscribed by Section 13k would, if permitted, "create the impression * * * in the public's mind that the Supreme Court is embroiled in or affected by such street pressures and picketing. Our tripartite government has a strong interest in sheltering its judicial branch from the appearance of influence by political forces and all outside pressures" (J.S. App. 32a). Judge MacKinnon also questioned the majority's suggestion that the restriction imposed by Section 13k is excessive because it extends beyond matters pending before the Court; he noted that "the subject[s] of on-going public campaigns and movements" are frequently "potential judicial issues" that are likely to come before the Court at some time (J.S. App. 47a). Judge MacKinnon remarked that Section 13k and Section 1507 "serve the important and substantial governmental interest of maintaining 'order and decorum' for the entire Court area and preserving the 'appearance of justice' " (J.S. App. 45a) and for that reason are "complementary" (*id.* at 37a).

Three judges, stating that they agreed with Judge MacKinnon's dissent, voted in favor of rehearing en banc (J.S. App. 53a-55a).

SUMMARY OF ARGUMENT

40 U.S.C. 13k does not prohibit any person from speaking about any subject; it regulates only expressive conduct of a certain manner—public demonstra-

tions, picketing and leafleting—in a certain place, the one square block on which the Nation's highest court is located. The statute is constitutional because it is "justified without reference to the content of the regulated speech, * * * [it] serve[s] a significant governmental interest, and * * * in doing so * * * [it] leave[s] open ample alternative channels for communication'" (*Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

A. 1. Section 13k is unquestionably content-neutral. It does not refer to the content, subject-matter, or message of the speech it regulates, and appellees have made no showing that it is enforced in a discriminatory fashion.

2. a. Section 13k has no effect at all on the First Amendment rights of the one group of demonstrators who have a clear interest in being on the Court grounds—those who are addressing the Court in an effort to influence it. *Cox II* established, and the court of appeals conceded, that the Constitution gives such speakers no right to be on the Court grounds and that 18 U.S.C. 1507 constitutionally prohibits them from being near the Court.

Other speakers—those who are not directly addressing the Supreme Court—have less of an interest in being on the Court grounds, and Section 13k leaves them such abundant alternative means of expression that it is likely to have no significant effect on their speech. Section 13k regulates expression only in one square block; it leaves demonstrators free to go anywhere else in the vicinity of the Court, including

the sidewalk directly across the street and the streets themselves in front of the Court. A demonstration in those places is easily visible to persons on the Court grounds and is unlikely to attract less attention than a demonstration on the sidewalk in front of the Court. Similarly, even from across the street demonstrators are able to use the Court as a symbolic backdrop for their activities. If appellee Zywicki had distributed leaflets about unfit judges directly across the street from the Court, for example, or if appellee Grace had demonstrated against Section 13k while standing directly across the street from the Court, few would have mistaken their point.

In any event, a statute does not violate the Constitution merely because it may marginally diminish the impact of some speech; otherwise, few regulations of time, place, or manner would ever be permitted. Section 13k has none of the vices of the restrictions that this Court has invalidated in the past: it does not prohibit the use of an entire means of public expression; it does not make public expression unreasonably difficult for speakers with little money or for speakers pursuing certain causes; and because it allows demonstrations in areas easily visible from the Supreme Court grounds, it does not prevent speakers from reaching their desired audience.

b. The slight practical effect that Section 13k has on First Amendment rights is further diminished because the area near a courthouse is not a "public forum" in which citizens have traditionally claimed broad rights of assembly and public expression. *Cox II* establishes that the government has far greater latitude to prohibit expression on courthouse grounds

than it does on an ordinary street. Indeed, by upholding a statute prohibiting speech on courthouse grounds that was akin to a restriction based on content, *Cox II* establishes that the area near a courthouse—like, for example, a military base—is one in which a citizen's right of access for First Amendment purposes is at a minimum.

B. 1. As the court of appeals acknowledged, Section 13k promotes important government interests. First, it serves the interests identified in *Cox II* —protecting against both actual interference with the judicial process and the danger that the public will perceive an action by the Court to be a response to pressure exerted by demonstrators. Comparable interests are sufficient to justify even content-based restrictions on speech; a fortiori, these interests are sufficient to justify a neutral, narrow regulation like Section 13k.

The court of appeals apparently believed that these interests could not be advanced in support of Section 13k because they are also served by 18 U.S.C. 1507. But the Constitution does not prohibit Congress from enacting two statutes that address the same problem in overlapping ways. Moreover, the court of appeals was not correct in suggesting that Section 13k is excessively restrictive because, unlike Section 1507, it is not limited to actions done "with the intent of influencing" the Court.

The intent requirement in Section 1507 is designed to protect such expression as "picketing to protest the actions of a[n] * * * official * * * completely unrelated to any judicial proceeding, who just happen[s] to have an office located in the courthouse building" (*Cox II*, *supra*, 379 U.S. at 567). Because

Section 13k applies only to the Supreme Court building and grounds, which house only the Court and related offices, the principal reason for an intent requirement is inapplicable to Section 13k.

In any event, demonstrations that are not intended to influence the Court will not have significantly less impact if they are held across the street from the Court, or in the street in front of it. At the same time, limiting Section 13k to expressive activities intended to influence the Court would have significant costs. Some demonstrations may be *seen* as influencing the Court—and therefore, under *Cox II*, are properly subject to regulation—even though it cannot be shown that the demonstrators *intended* to influence the Court.

Perhaps more important, including a specific intent requirement in Section 13k "would actually increase opportunities for the content-based censorship disfavored by the First Amendment" (*New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 1 (O'Connor, J., concurring)). Policemen, prosecutors, and jurors would unavoidably have considerable discretion in making the difficult judgment whether a demonstration was intended to influence the Court—as opposed to, for example, being intended to protest an earlier decision or to express the speakers' views on a social issue implicated by the Court's decisions. The content of the expression would often be the principal evidence of the speaker's intent. Under *Cox II*, this is not an unconstitutional measure of discretion to vest in officials when necessary to permit demonstrations that are directed at non-judicial officials who happen to be located in a courthouse building. But there is no

need to apply such a discretionary criterion to the Supreme Court grounds.

2. Section 13k also reflects a judgment by Congress that the dignity of the Supreme Court and the symbolic purposes it serves are incompatible with public demonstrations. Congress undoubtedly has the power to establish national monuments and to attempt in other ways to give symbolic meaning to certain public places; in the exercise of this power, as in the exercise of its other powers, Congress may place reasonable and appropriate restrictions on the place or manner of expression. For example, Congress surely has the power to restrict or even prohibit public demonstrations in a national cemetery in order to protect its symbolic character as a place that is tranquil and sacrosanct.

In enacting Section 13k, Congress treated the building and grounds of the Supreme Court as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, informed by vigorous debate within the courtroom but immune from outside pressure and political controversy. Because of its constitutional status and its historic role, the Nation's highest court is a uniquely appropriate symbol of these values. No other building housing an operating institution of government is more emblematic of a process open to the orderly presentation of argument but free from the insistent popular pressure that demonstrators—properly, in other settings—represent. In view of Congress's undoubted power to create and define symbols, and the slight burden Section 13k imposes on speech, there is no basis for rejecting Congress's decision to give this symbolic stature to the Supreme Court.

ARGUMENT

40 U.S.C. 13k IS A PERMISSIBLE REGULATION OF THE PLACE AND MANNER OF EXPRESSION

A. Section 13k Is a Content-Neutral Regulation That Leaves Open Ample Alternative Means of Expression

1. This Court has " 'often approved restrictions [on expressive activities] * * * that * * * are justified without reference to the content of the regulated speech, that * * * serve a significant governmental interest, and that in doing so * * * leave open ample alternative channels for communication * * *.' " *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104 (1971); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). See also *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

40 U.S.C. 13k is plainly a neutral regulation " 'applicable to all speech *irrespective of content*' " (*Carey* v. *Brown*, 447 U.S. 455, 470 (1980), quoting and adding emphasis to *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975)). Section 13k does not refer to either the content or the subject matter of the expression it regulates; it bars all demonstrating and leafleting on the Supreme Court grounds, whatever the speaker's message. The Marshal of the Supreme Court stated in an affidavit filed in the district court that Section 13k "is enforced uniformly without regard to [the] message of the expressive conduct"

(Mot. to Aff. App. 38a). Neither the district court nor the court of appeals found any evidence of discriminatory enforcement.[3] Section 13k therefore presents no danger that "communication has * * * been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 536, quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

2. In addition, Section 13k imposes only a minimal burden on protected speech. It does not prohibit any person from speaking about any subject; it regulates only expressive conduct of a certain form—public demonstrations, picketing, and leafleting—in a certain place, the one square block on which the Court is located.[4]

---

[3] In their Motion to Affirm, appellees repeatedly contend (*e.g.*, Mot. to Aff. 9, 10, 11-12, 19) that there is evidence of discriminatory enforcement of Section 13k and other statutes regulating activities on the Supreme Court grounds. But a claim of discriminatory enforcement presents a question of fact (see, *e.g.*, *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)), and appellees never proved in the district court that Section 13k is enforced in a discriminatory fashion. In addition, the court of appeals specifically noted that it was deciding the constitutionality of Section 13k, even though the district court did not address that issue, only because that issue did not present any factual questions. See J.S. App. 9a n.9 ("[S]ince [appellees] challenge the constitutionality of § 13k on its face, the resolution of this issue is purely one of law, appropriate for appellate review."). See also J.S. App. 36a n.3 (MacKinnon, J., dissenting) ("Since the majority has treated this case as raising the issue only of the facial construction of § 13k, I will limit my remarks similarly.").

[4] The court of appeals repeatedly referred to Section 13k as an "absolute prohibition of expression," because of which "First Amendment rights * * * [can] never be exercised in

One category of demonstrators—those who are addressing the Court and attempting to influence it—may attach particular significance to this location. They may wish to be as close to the Court as possible in order to make the Court aware of their presence and numbers. But *Cox II* established, and the court of appeals conceded (J.S. App. 22a-23a), that the Constitution gives such speakers no right whatever to be on the Court grounds, and 18 U.S.C. 1507 constitutionally prohibits them from being near the Court. Section 13k therefore has no effect on the First Amendment rights of those who have the clearest reason for wanting to demonstrate on the Supreme Court grounds.

Other speakers—those whose message is unrelated to the work of the Court—also are prevented by Section 13k from engaging in expressive activities in the immediate vicinity of the Court, but such persons have far less of an interest in being on the Court grounds, and it seems unlikely that a one-square-block restriction will affect the impact of their speech. Section 13k leaves them ample alternatives; they are free, for example, to leaflet and picket across the street from the Court. Moreover, subject only to local District of Columbia regulations that appellees do not challenge, demonstrators may parade on the streets directly in front of the Court. D.C. R. & Regs. tit. 35, § 107 (1970); D.C. Mun. Regs. tit. 35, §§ 1.1-1.6 (1975).

---

any form" on the Supreme Court grounds (J.S. App. 26a). See *id.* at 2a, 20a, 23a, 24a, 25a, 27a, 28a, 29a. This is of course incorrect; Section 13k does not, for example, prohibit private discussions among persons properly on the Court grounds, nor, obviously, does it prohibit the vigorous presentation of legal argument in the Court.

A demonstration across the street from the Court, or on the street in front of the Court, is easily visible to persons on the Supreme Court grounds; in all probability, it attracts no less attention than a demonstration on the sidewalk in front of the Court. Similarly, demonstrators who consider the Supreme Court grounds to be the most appropriate symbolic backdrop for their activities are able, even from across the street, to use the Court as a background and to take advantage of the connotations of its proximity. If appellee Zywicki had distributed leaflets about unfit judges directly across the street from the Court, for example, or if appellee Grace had chosen that site for her demonstration against Section 13k, few passers-by would have mistaken their point.

But even if Section 13k does marginally diminish the impact of some protected speech—if, as the court of appeals suggested (J.S. App. 24a), a leafleter encounters fewer people across the street from the Court, or if demonstrators consider the symbolic aspects of their expression impaired by using the street in front of the Court instead of the Court grounds—that would not be sufficient to render Section 13k unconstitutional. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 134-135 (1981) (Brennan, J., concurring). This Court has repeatedly upheld restrictions that reduced a speaker's audience or the impact of his expression in some way, because the alternatives were "ample" and the regulation did not discriminate on the basis of content. See, *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 654-655; *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Kovacs* v. *Cooper*, *supra*, 336 U.S. at 87-88 (opinion of Reed, J.); *Cox* v. *New Hampshire*, *supra*, 312 U.S.

at 574. See also *Cox* v. *Louisiana* (*Cox I*), 379 U.S. 536, 554-555 (1965).[5] Scarcely any regulation in this area could be sustained if the First Amendment gave every speaker an absolute right to speak at the time and place, or in the manner, that attracts the largest audience or the most attention.

In addition, Section 13k has none of the characteristics that have prompted this Court to invalidate restrictions on expression in the past. For example, unlike a prohibition on leafleting in all of a city's streets (see *Schneider* v. *State*, 308 U.S. 147 (1939)), Section 13k does not sharply reduce the speaker's audience, or make it unduly difficult or expensive for a speaker to reach members of the general public. Because Section 13k allows demonstrators and leafleters to go near

---

[5] The court of appeals attempted to distinguish these cases on the ground that they involved only a regulation of the time, place, or manner of expression within an area; Section 13k, the court said, "does not merely limit the area of the Supreme Court grounds available for expressive conduct [but] * * * absolutely prohibits all expressive conduct throughout the grounds" (J.S. App. 26a n.20; see also Mot. to Aff. 19). But the legality of a regulation must depend on its actual impact on protected rights, not on an arbitrary definition of the relevant area. Here, for example, if the relevant forum is defined as the vicinity of the Supreme Court (or as the public places of Washington, D.C.), Section 13k does "merely limit the area * * * available for expressive conduct" and does not prohibit demonstrations throughout the forum.

Moreover, as we discuss (pages 17-21, *infra*), the Supreme Court grounds themselves are not properly treated as a "public forum" in which the government's power to regulate expressive activities is strictly limited, and within the Supreme Court grounds the government has exceptionally strong interests in regulating speech and may impose a more complete restriction than it could place on expression in the streets and public places generally (see pages 21-39, *infra*).

the Supreme Court grounds, where they are likely to be noticed by persons entering or leaving the grounds, it does not even "ha[ve] the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate" (*United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring)) in the way that, for example, a ban on picketing residences would prevent speakers from reaching those who live in a particular neighborhood (see *Carey* v. *Brown*, *supra*, 447 U.S. at 468-469 n.13).[6] Similarly, Section 13k does not bar a means of communication that is "essential to the poorly financed causes of little people" (*Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943) (absolute prohibition on house-to-house solicitation)). And contrary to the court of appeals' suggestion (J.S. App. 24a-25a), Section 13k does not implicitly invite members of the public to ignore dissidents by allowing expression "only in an area that a benevolent government has provided as a safe haven for crackpots" (*Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969)); Section 13k leaves demonstrators free to choose a site for their expressive activity anywhere in the vicinity of the Supreme Court, and there is no reason to believe that they will be taken less seriously because they are not on the same square block as the Court itself.

Finally, the practical effect Section 13k has on expression, if any, is of diminished constitutional significance because, under this Court's decisions, the area immediately surrounding a courthouse is not a "public forum"—a place to which citizens may freely

---

[6] We note that in neither *Carey* (see 447 U.S. at 459 n.2) nor *O'Brien* did the Court hold that a measure that had such an effect would be unconstitutional.

gain access for public demonstrations, and in which the government's power to regulate expressive activities is limited. See Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1. While the Court has not always used the notion of a "public forum" in analyzing the right to assemble or demonstrate on public property, the Court's decisions suggest that the validity of a time, place, or manner restriction depends not only on its actual effect on speech but on the kind of government property involved—whether it is property that "in an open democratic society * * * [is] an important facility for public discussion" in which the citizen who is demonstrating "is exercising an immemorial right of a free man" (*id.* at 11-13).

Specifically, the Court's decisions seem to divide public places into three categories. The first category consists of the true public forums, those areas—notably streets and parks—that have historically been open to citizens to use for expressive actvities: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). See also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 655 (suggesting that a state fair is a "limited public forum"). The Court has, therefore, scrutinized limits on access to streets and parks more closely. See, *e.g.*, *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152-153 (1969); *Cox I*, *supra*.

Streets and parks, however, can easily accommodate many forms of expression, and such activities as picketing, leafleting and demonstrating are not in-

compatible with the uses to which such public property is lawfully dedicated. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*, 453 U.S. at 129-131 & n.6. A second category of public property serves more specialized purposes; in these areas, the public right of access is reduced and the government's "special interests * * * in overseeing the use of its property" (*Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 540) are stronger. Accordingly, in these areas the government has greater latitude to prohibit expression that is "basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). For example, noisy demonstrations may be prohibited outside schools (*id.* at 117-121) or inside libraries (*id.* at 116; see also *Brown* v. *Louisiana*, 383 U.S. 131 (1966)); demonstrators may be barred from jail grounds (*Adderley* v. *Florida*, 385 U.S. 39 (1966)); and unstamped mailable matter may be barred from a mailbox (*United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*). Although the difference is one of degree, the Court has suggested that such areas are not to be regarded as "public forums" (see 453 U.S. at 128-133); the citizen's "First-Amendment easement" (Kalven, *supra*, 1965 Sup. Ct. Rev. at 13) is narrowly limited, and the government may impose more stringent regulations, as long as the regulations are reasonable and do not differentiate on the basis of the content of speech. 453 U.S. at 131 n.7, 132-133.

In the third category of public places, the government's interests are of such a nature and magnitude that it may even regulate speech on the basis of its content, if it has a reasonable basis for its distinctions. The Court has stated emphatically that these

areas are not public forums. Thus, for example, prison authorities may restrict expression related to a prisoners' union (*Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 133-136 (1977)), and the government may restrict political expression on a military base (*Greer* v. *Spock*, 424 U.S. 828, 838 n.10 (1976)). See also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (public transportation); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 514 n.19 (1981) (plurality opinion). Under *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 537-540, these must be regarded as distinctions based on the content of expression. See *Carey* v. *Brown*, *supra*, 447 U.S. at 462 n.6.

Cox II establishes that courthouse grounds are not a public forum; arguably, they fall into the third category. In *Cox II*, the Court ruled that a peaceful protest march could be prohibited from approaching a courthouse (379 U.S. at 560-566). A similar march would very likely have been constitutionally protected elsewhere on the public streets (see *Shuttlesworth* v. *Birmingham*, *supra*, 394 U.S. at 152-153; *Gregory* v. *Chicago*, 394 U.S. 111 (1969)); indeed, shortly before its decision in *Cox II*, the Court reversed the convictions of protesters who had held a "strikingly similar" (*Cox I*, *supra*, 379 U.S. at 544) march on the grounds of a state capitol. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); see Kalven, *supra*, 1965 Sup. Ct. Rev. at 4-6. Thus, *Cox II* settled with "unequivocal clarity * * * the point that no matter who you are or what your grievance, you cannot picket the courthouse." Kalven, *supra*, 1965 Sup. Ct. Rev. at 10. Moreover, as we will explain (see page 30, *infra*), the statute upheld in *Cox II* is in many respects akin to a classification of speech on the basis of content.

Accordingly, courthouses cannot be classified with streets and parks as public forums, or even with such places as the area near a school, where the citizen's right of access, while subject to significant regulation, is not wholly insubstantial. Instead, near a court, the government's power to regulate expressive activity is at its greatest, and the citizen's right to demonstrate is significantly diminished. The restriction imposed by Section 13k is therefore minimal both because it has only a slight practical effect on protected expression and because it does not regulate the kind of property the use of which "for purposes of assembly * * * has, from ancient times, been a part of the privileges * * * of citizens" (*Hague* v. *CIO*, *supra*, 307 U.S. at 515).

B. Section 13k Promotes Important Government Interests and Is Not Excessively Restrictive

1. Within the Supreme Court Grounds, Section 13k Protects Against Real or Apparent Interferences With the Judicial Process in a Way Superior to 18 U.S.C. 1507

a. The court of appeals acknowledged the government's unusually strong interests in regulating picketing and demonstrating near federal courts (J.S. App. 20a-21a), and it did not deny that Section 13k promotes these interests. Congress has an interest, first, in "protecting [the] judicial system from the pressures which picketing near a courthouse might create. * * * [A] legislature has the right to recognize the danger that some judges * * * and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms * * *." *Cox II*, *supra*, 379 U.S. at 562-565.

Perhaps even more important, so far as Section 13k is concerned, is the government's interest in "protect[ing] the judicial process from being misjudged

in the minds of the public." *Cox II*, *supra*, 379 U.S. at 565. A decision rendered shortly after a well-publicized demonstration on the issue involved may be perceived as a reaction to the demonstration; Congress "may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Ibid.*[7]

---

[7] The demonstrators in *Cox II* urged that such cases as *Bridges* v. *California*, 314 U.S. 252 (1941), and *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), barred the government from offering this reason in support of a restriction on picketing near the courthouse. See 379 U.S. at 563-564. Those cases held that the First Amendment prohibited "the contempt power [from being] used to punish out-of-court comments concerning pending cases or grand jury investigations" (*Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 844 (1978); see also *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962)). The Court in *Cox II* rejected this argument for two reasons. First, it noted that it was dealing not with the undefined common law contempt power but with "a statute narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process" (379 U.S. at 563-564). As we explain (pages 28-32, *infra*), one of the principal virtues of Section 13k is that it is significantly narrower and more specific than the statute upheld in *Cox II*.

Second, the Court in *Cox II* recognized that demonstrating near a courthouse poses greater dangers, and can be regulated with less cost to First Amendment values, than the publication of information and views. See 379 U.S. at 564. Whether or not a sharp line can be drawn between pure speech and expressive conduct, it is undeniable that demonstrators—who use their physical presence to convey their message in a forceful fashion—present different regulatory concerns from those who use only words. See, *e.g.*, *Cox I*, *supra*, 379 U.S. at 555; *Greer* v. *Spock*, *supra*, 424 U.S. at 849 (Powell, J., concur-

The importance of protecting the judiciary against actual intimidation need not be elaborated. See, *e.g.*, *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923). Protecting against the appearance that popular pressures have affected a decision is also fundamental to the judicial process. See *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). As Judge MacKinnon noted in his dissent (J.S. App. 33a), even a judge who is in fact impartial must disqualify himself if "his impartiality might reasonably be questioned." 28 U.S.C. 455(a). Indeed, the government's interest in avoiding the appearance of improper political influence is of such importance that it can justify restrictions that are based on the *content* of speech and that discriminate against political expression—even though restrictions based on content are the most suspect (see *Hudgens* v. *NLRB*, 424 U.S. 507, 520 (1976), quoting *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972)) and political speech is at the core of the expression protected by the First Amendment (see *Brown* v. *Hartlage*, No. 80-1285 (Apr. 5, 1982), slip op. 7, quoting *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966)).

In *Greer* v. *Spock*, *supra*, the Court held that political speeches, rallies, and leafleting could be prohibited on a military base—even though other civilian expressive activities were allowed—because of the importance of keeping the military "insulated from

---

ring) ("[F]ace-to-face persuasion * * * has an immediacy and impact not found in reading papers and watching television."). Moreover, a ban on publication suppresses expression totally, at least for a period of time. By contrast, Section 13k not only permits demonstrations to take place, but allows them to be held at locations that scarcely diminish their impact.

both the reality *and the appearance* of acting as a handmaiden for partisan political causes or candidates." 424 U.S. at 839 (emphasis added). See *id.* at 846 (Powell, J., concurring) ("There is * * * a legitimate public concern with the preservation of the appearance of political neutrality and nonpartisanship. There must be public confidence that * * * undue military influence on the political process is not even a remote risk."). Similarly, in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld the Hatch Act prohibition against active participation by federal civilian employees in political campaigns or political management,[8] in part because "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565. In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld a regulation that prohibited political advertising, but not advertising with a different content, in a city's public transit system; one of the reasons given by the plurality was the need to avoid the appearance of political favoritism by the city. *Id.* at 304. The statute approved by *Cox II* is itself akin to a regulation based on the content of speech. See page 30, *infra*.

---

[8] 5 U.S.C. 7324(a)(2). This too is a restriction on content; it differentiates between political speech and speech on other subjects. See generally *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 536-540; Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 94-95 (1978).

Plainly, by preventing demonstrators from closely approaching the Court, Section 13k directly protects against the appearance that political pressure can influence a judicial decision. If similar interests were substantial enough to sustain the measures in *Greer*, *Letter Carriers*, *Lehman*, and *Cox II*, they are necessarily sufficient to support Section 13k. That statute applies only to the Nation's highest court, and accordingly the government's interest in fostering the appearance of impartiality and due proces of law is at its zenith; the statute achieves its purposes without classifying speech on the basis of content or discriminating against political speech; and, as we have explained, the statute imposes only a slight burden on protected expression.[9]

---

[9] We recognize, of course, that a single leafleter or demonstrator—or, for that matter, most small crowds or a well-behaved large crowd—will usually not create an actual danger of real or perceived intimidation of the judiciary. But the court of appeals explicitly struck down Section 13k on its face, not just as applied to appellees, thus holding that it had no constitutional applications. See J.S. App. 27a. Moreover, the Court upheld the regulation at issue in *Greer* even though an occasional political leafleter on a military installation is most unlikely to undermine the "strong tradition, now nearly two centuries old, of maintaining noninvolvement by the military in politics" (424 U.S. at 845 (Powell, J., concurring)). In *Cox II*, the Court did not consider whether the demonstration in question actually created the dangers of real or apparent intimidation of the state judges; nor did it suggest that a statute directed at these evils could not constitutionally be applied to a small and obviously innocuous group of demonstrators.

The judgment whether a particular group of demonstrators actually threatens the interests identified in *Cox II* must take into account not only the size of the group, but the nature of its actions and, perhaps most important, the context in which the demonstration occurs. But there is significant value in

b. The court of appeals did not deny that Section 13k promotes these important interests in the integrity of the judicial system. Instead, the court struck down Section 13k because, it asserted (J.S. App. 22a), these interests are "fully addressed" by 18 U.S.C. 1507. We know of no reason—and the court of appeals suggested none—to believe that the Constitution prohibits Congress from enacting two statutes that address the same problem in overlapping ways. See *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968) ("[I]t has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest.").[10] The court of appeals must, therefore, have meant that Section 13k is excessively restrictive because, unlike Section 1507, it is not limited to actions done "with the intent of influencing" the Supreme

---

reducing the discretion allowed to officials administering statutes that affect First Amendment rights. Therefore, as we explain (pages 28-32, *infra*), when a legislature has expressed a considered judgment that, in order to protect certain interests, expression should be regulated in a particular, content-neutral fashion that does not greatly burden First Amendment rights, and the regulation leaves only the minimum discretion to the administering officials, the courts should not lightly reject the legislature's solution.

[10] The Court has occasionally reasoned that other legislation in an area reveals that the legislature was not actually concerned to advance the objectives proffered as justifications for the challenged restriction. See, *e.g.*, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981); *Carey* v. *Brown*, *supra*, 447 U.S. at 465; *Eisenstadt* v. *Baird*, 405 U.S. 438, 448-452 (1972). But no aspect of 18 U.S.C. 1507 undermines the justifications we have offered for Section 13k; on the contrary, Section 1507 shows, if anything, the significance Congress attaches to the interests promoted by both statutes.

Court (see J.S. App. 23a). The court's reasoning is flawed in several respects.

First, the court of appeals misconceived the purpose of the specific intent requirement in Section 1507. That requirement does impose an important limitation on the statute's prohibition, but the limitation is irrelevant to demonstrations at the Supreme Court. In *Cox II*, the Court suggested that the requirement of an intent to influence the court was necessary to the constitutionality of a prohibition on courthouse picketing, but only because that requirement protects such expression as "picketing to protest the actions of a[n] * * * official * * * completely unrelated to any judicial proceedings, who just happen[s] to have an office located in the courthouse building" (379 U.S. at 567). Section 13k applies only to the Supreme Court, which houses only the Court and related offices. Nothing in *Cox II* suggests that a specific intent requirement would be needed to sustain a prohibition against demonstrating at a building that houses only a court.

Second, the court of appeals suggested that, because it omits a specific intent requirement, Section 13k impermissibly restricts demonstrations that are unrelated or only indirectly related to the work of the Court. But as we have explained, the impact of Section 13k on such activities is minimal; the speakers need only move across the street, or perhaps into the street directly in front of the Court. In view of the tangential relationship between their speech and the Court, this is unlikely to have a substantial effect on the effectiveness of their speech. Moreover, there are unlikely to be many demonstrations at the Court that are wholly unrelated to the Court's work, both because the Court deals with a wide range of issues of public importance and because those interested in

demonstrating about matters unrelated to the Court's business are likely to choose other, more suitable, sites in Washington.

Finally, limiting Section 13k to expressive activities intended to influence the Court would have significant costs—including costs to the values protected by the First Amendment. The court of appeals failed to recognize, for example, that because of its intent requirement Section 1507 only imperfectly protects the government's interests in preventing the actual or perceived intimidation of the judiciary. Some demonstrations may be *seen* as influencing the Court—and therefore be properly subject to regulation—even though it cannot be shown that the demonstrators *intended* to influence the Court. The issues with which the Court is concerned are often the subject of debate in the other branches of government and in society generally; demonstrators addressing such an issue may want to use the Court as a setting while subjectively agreeing that the Court should be guided only by the law. Their subjective intention, however, will often not be apparent to members of the public, and a decision on the issue following shortly after the demonstration may be seen as a reaction to the demonstration.

More important, including a specific intent requirement in Section 13k "would actually increase opportunities for the content-based censorship disfavored by the First Amendment" (*New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 1 (O'Connor, J., concurring)). In cases dealing with the regulation of speech in public places, this Court has repeatedly emphasized that official discretion is undesirable, and is to be limited so far as possible by "narrowly drawn, reasonable and definite standards" (*Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); see, *e.g.*, *Shut-*

tlesworth v. *Birmingham*, *supra*, 394 U.S. at 150-153 & n.2 (citing cases); *Kunz* v. *New York*, 340 U.S. 290, 294 (1951); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (1938); Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 40-41 & n.165 (1980), citing *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) ("[A] man may not be punished for words or for a street demonstration under a * * * rubric * * * that leaves wide discretion to the police, public prosecutors, and judges * * *."). Jurors, too, should not be invited to make discretionary judgments when First Amendment rights are at stake. See *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974); *Herndon* v. *Lowry*, 301 U.S. 242, 261-263 (1937); Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526-529 (1970).

Officials administering a statute that makes the legality of expression depend on whether the speaker intended to influence a court do not have the uncontrolled discretion that this Court has condemned; but they undeniably have far more discretion than they would have in administering Section 13k. It will often be difficult to distinguish between a speaker who is attempting to influence the Court and one who is only attempting to influence the public or to express himself.[11] Many highly controversial social issues that frequently inspire demonstrations are repeatedly implicated in the Court's decisions, and can be expected to come before the Court at some time in the future; it will be difficult to determine whether demonstrations about such issues are intended to influence the

---

[11] For example, Judge MacKinnon presented a substantial argument that appellee Grace, in protesting Section 13k, was attempting to influence either the Court or court officers (J.S. App. 35a n.3).

Court. And it will not always be clear whether a demonstration protesting a decision of the Court should be regarded as an attempt to influence the future course of the Court's decisions.

These difficulties are aggravated because an "intent of influencing" requirement has many of the characteristics of a restriction on the content of speech. Necessarily, the content of the expression will be the primary, and often the conclusive, evidence of the speaker's intent. See *Cox II*, *supra*, 379 U.S. at 567. Indeed, if a speaker's intent to influence the Court could not be inferred from his statements and the actions associated with them, his intent would not be relevant to the objectives of preventing the real or perceived intimidation of judges. Thus, a specific intent requirement demands that officials make discretionary decisions based on the content of expression. This is precisely the allocation of powers that the Court has repeatedly enjoined legislatures to avoid.

Cox II held that these significant costs to First Amendment values are justified when an intent requirement is needed to protect demonstrations directed at a non-judicial official who happens to be located in a courthouse. But as we have explained, no such purpose would be served by applying an intent criterion to demonstrations at the Supreme Court. Accordingly, Congress chose to reduce discretionary enforcement by legislating, for the Supreme Court grounds, the more "explicit standards" of Section 13k, instead of a statute with an intent criterion that, to a greater degree, " 'delegates [decisions] * * * to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application'."

(*Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982), slip op. 8, quoting *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 108-109; see *Saia* v. *New York*, 334 U.S. 558, 562 (1948); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at 305-306).[12]

---

[12] These interests in support of Section 13k are substantial, even though Congress has also enacted a statute, Section 1507, that permits such discretionary judgments. Section 13k does effectively limit the discretion of officials within the Supreme Court grounds; within that small area, they are charged with enforcing Section 13k, and they cannot ignore it and apply only 18 U.S.C. 1507. In order to defend against a claim of discriminatory enforcement, for example, the responsible officials would have to show that they reasonably implemented Section 13k, not just Section 1507.

Similarly, it might be argued that Section 13k cannot possibly be more protective of First Amendment interests than a similar statute with a specific intent requirement, because the latter statute would necessarily permit more expression on the Supreme Court grounds. But the First Amendment is not a simplistic requirement that the gross amount of expressive activity in society be maximized; the First Amendment, as this Court has developed its principles, is a more subtle regulation of the relationship between the citizen and the government. One of those principles is that administrative discretion, and content-based distinctions, are to be avoided if possible. The Court has repeatedly refused to allow a discretionary regime, or a distinction based on content, even when the alternative may have been a ban on all expression. See, *e.g.*, *Carey* v. *Brown*, *supra*, 447 U.S. at 466-467; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Cox I*, *supra*, 379 U.S. at 555-558. See generally *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow * * * officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

Finally, in addition to substantially reducing the discretion of administrative officials, Section 13k gives "the Court * * * the benefit of a narrow, precise * * * statute representing a legislative judgment that in this one limited area picketing is improper" (Kalven, *supra*, 1965 Sup. Ct. Rev. at 32). Under this Court's decisions, such a considered legislative judgment, reflecting an assessment of the facts and a weighing of the interests bearing on a particular problem, is entitled to deference even in the First Amendment area. "Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be * * * proscribed' * * * assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned* v. *City of Rockford, supra*, 408 U.S. at 109 n.5, quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1963). See *United States* v. *Robel*, 389 U.S. 258, 272-282 (1967) (Brennan, J., concurring); *Garner* v. *Louisiana*, 368 U.S. 157, 200-203 (1961) (Harlan, J., concurring). As Professor Kalven has explained, in a passage this Court has cited (Kalven, *supra*, 1965 Sup. Ct. Rev. at 32 (footnotes omitted); see *Grayned* v. *City of Rockford, supra*, 408 U.S. at 109 n.5):

> The point is not simply that a precise statute avoids vagueness or reduces the chances of unequal administration or even that by leaving other places and times available it presents the Court with only a modest restriction. It is rather that, in the difficult balancing process these cases force upon the Court, it has the benefit of the counsel of a deliberate, specific, and relevant legislative judgment.

2. *Congress May Properly Determine That the Supreme Court Serves Symbolic Purposes Incompatible with the Manner of Public Expression Prohibited by Section 13k*

a. Congress plainly has the power to determine that certain areas and structures owned by the government will serve as national monuments and memorials, and that public buildings will serve symbolic as well as practical functions. See, *e.g.*, *Nixon* v. *Administrator of General Services*, 433 U.S. at 425, 477-478 & n.42 (1977); *Roe* v. *Kansas*, 278 U.S. 191 (1929); *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668 (1896). Symbolic practices are common in government, and particularly in the courts; while their practical effects are difficult to specify, they help maintain important rules and traditions and enhance values consistent with the rule of law. As the court of appeals acknowledged, Congress may decide, for example, that the symbolic mission of a court requires a certain architecture (see J.S. App. 24a) or warrants inscribing a secular motto on the building.

In some circumstances, a restriction on public expression will also be reasonably ancillary to the exercise of this power. See *Smith* v. *Goguen*, *supra*, 415 U.S. at 587 (White J., concurring) ("There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlying it with words * * *."). Public expression, particularly if it involves conduct—such as holding a placard, parading, or distributing leaflets—can affect the government's ability to imbue a setting with a symbolic meaning. See *Greer* v. *Spock*, *supra*, 424 U.S. at 844 (Powell, J., concurring) ("symbolic incompatibility" between military life and political leatfleting and rallies on a military base). It is true

that symbolic concerns are more intangible than the interests in public safety and convenience that generally justify place and manner regulations; in addition, Congress necessarily and appropriately has some discretion to define the symbolic functions of a place and therefore the extent to which public expression is inconsistent with those functions. But this Court has never suggested that only objectively defined interests can justify a restriction on speech, and in a variety of contexts it has recognized the importance of symbolic and intangible interests that cannot be precisely quantified. See, *e.g.*, *Cabell* v. *Chavez-Salido*, No. 80-990 (Jan. 12, 1982), slip op. 14-15 (symbolic and educational roles of probation officer justify citizenship requirement); *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 279-280 (1981) (natural beauty); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974) ("family values, youth values, and the blessings of quiet seclusion and clean air"). Thus, for example, a national cemetery is properly tranquil, sacrosanct, and removed from the commotion of ordinary life. It is surely reasonable for Congress to decide that, in order to promote these symbolic objectives, it will restrict or even prohibit public demonstrations in cemeteries.

In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981), the Court held that esthetic interests can justify restrictions on speech, even though those interests are intangible and are defined in large measure by a legislature's "necessarily subjective" judgment that "def[ies] objective evaluation * * *." *Id.* at 510 (plurality opinion); see *id.* at 530 (Brennan, J., concurring); *id.* at 549-550 (opinion of Stevens, J.) (discussing graffiti on public buildings); *id.* at 560 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dis-

senting); see also *Berman* v. *Parker*, 348 U.S. 26, 32-33 (1954). The government's power to promote symbolic interests by regulating expression in public buildings and areas follows a fortiori from *Metromedia*. *Metromedia* involved a regulation of private property, while the power to determine that government buildings and grounds will serve symbolic functions implicates "the special interests of [the] government in overseeing the use of *its* property" (*Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 (1980) (emphasis added); see *Spence* v. *Washington*, 418 U.S. 405, 408-409, 411 (1974)). Moreover, the promotion of esthetic interests has only recently been fully accepted as a legitimate end of government (see *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1447-1450 (1978)), while we doubt that the government's power to establish national monuments has ever been seriously disputed.

We recognize that there must be some limits on the power to regulate expressive activities for symbolic purposes. We do not suggest, for example, that Congress could declare all of the Nation's capital to be a symbol of tranquillity, and ban all demonstrations within its boundaries. Courts must ensure that a regulation does not seriously impair First Amendment rights, and to some extent they may inquire into the appropriateness and reasonableness of Congress's judgment that the symbolic purpose to which an area is dedicated is inconsistent with a particular form of public expression. By the same token, however, the First Amendment does not require that *every* public place be a monument only to the "verbal tumult, discord, and even offensive utterance" (*Cohen* v. *California*, 403 U.S. 15, 24-25 (1971)) that are properly protected throughout much of society. Accordingly, when Congress makes a reasonable and ap-

propriate decision to limit public expression at a certain site in order to preserve its symbolic character, and that decision does not place excessive burdens on expression, the legislative judgment should not be overturned.

b. In enacting Section 13k, Congress made such a decision; it determined to treat the building and grounds of the Nation's highest court as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, informed by vigorous debate within the courtroom but free from outside pressure and political controversy. Section 13k, as the court of appeals acknowledged (J.S. App. 22a-23a), is one provision of a statute intended to preserve "the dignity which should surround the Supreme Court of the United States and the building and grounds which house it." S. Rep. No. 719, 81st Cong., 1st Sess. 2 (1949); see H.R. Rep. No. 814, 81st Cong., 1st Sess. 2 (1949).[13] As we have explained, Section 13k serves these purposes at little or no cost to protected expression. It has no effect at all on the constitutional rights of those who are attempting to influence the Court; its practical effect on other speakers' rights is very limited; and it does not bar access to a "public forum" where citizens may legitimately claim broad expressive rights. The Court has consistently upheld restrictions of this limited nature when they promoted significant government interests. See pages 14-21, *supra*.

Moreover, it was appropriate for Congress to choose the building and immediate surroundings of the Su-

---

[13] Other provisions of the statute of which Section 13k is a part (Act of Aug. 18, 1949, ch. 479, 63 Stat. 616) prohibit solicitations and commercial advertisements in the Court or on its grounds (40 U.S.C. 13h); discharging firearms, setting fires, or uttering loud and abusive language (40 U.S.C. 13j); and climbing on or injuring statues, walls, fountains, or plants (40 U.S.C. 13i).

preme Court to dedicate as a symbol of the "calmness and solemnity of the courtroom" (*Cox II*, *supra*, 379 U.S. at 583 (opinion of Black, J.)) and the independence of the judicial branch from political pressure, and to make the judgment that public demonstrations are "basically incompatible with" these symbolic purposes (*Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116).[14] Every court—unlike the elected branches of government—should be free from political pressure. "It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements* v. *Fashing*, No. 80-1290 (June 25, 1982), slip op. 10 (plurality opinion).[15] But the Supreme Court, for many reasons, "holds a unique place" (A. Meiklejohn, *Free Speech* 32 (1948)). It

---

[14] Other symbolic uses of the Court might also have been appropriate; the court of appeals, for example, apparently would have preferred to treat the Court as a monument to the virtues of robust public expression. See, *e.g.*, J.S. App. 24a, 26a. But as long as the First Amendment is not violated, this choice about the Nation's symbols and monuments is for Congress, not a court, to make.

[15] Thus, as we noted (page 20, *supra*), it is well established that demonstrations that may be constitutionally protected near a legislature are impermissible near a courthouse. Compare *Cox II*, *supra*, with *Edwards* v. *South Carolina*, *supra*. See *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C.) (three-judge court), aff'd, 409 U.S. 972 (1972) (demonstrations on Capitol grounds are permissible although similar demonstrations near a courthouse are not, because Congress, unlike a court, is appropriately subject to public opinion); *A Quaker Action Group* v. *Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975) (White House area is a "unique situs" for the exercise of First Amendment rights).

is the single court peculiarly well suited to act as a symbol for all others. Congress could properly recognize that the Supreme Court's constitutional status, and the wide impact of its decisions, make it the focus of aspirations for an independent judiciary that resists popular pressure and decides cases according to reason and law.

> [T]he Supreme Court as a legitimating force in society * * * casts a * * * larger spell. With us the symbol of nationhood, of continuity, of unity and common purpose, is, of course, the Constitution * * *. The utility of such a symbol is a commonplace. * * * [And] it has in large part been left to the Supreme Court to concretize the symbol of the Constitution.

A. Bickel, *The Least Dangerous Branch* 31 (1962). It is, therefore, not an overstatement to say that no other building housing an operating institution of government is more appropriately treated as a symbol of orderly, impartial process and freedom from outside influence.[16]

Section 13k reflects a reasonable conclusion that requiring demonstrators to move from the grounds of the Court to a nearby area—while only a gesture so far as their exercise of First Amendment rights is concerned—is a gesture that symbolizes the independence of the Supreme Court, and by implication all courts, from the demands of insistent popular opinion.

---

[16] **The public interest in fostering the appearance of justice is strongest in regard to the Supreme Court, which stands at the apex of our judicial system. A lower court judgment that appears to be influenced by extraneous considerations may be corrected on appeal. There is no appeal from this Court.**

There is no sufficient reason to deny Congress the power to pursue these symbolic objectives in a way that has so slight an impact on protected expression.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys

SEPTEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 386789 1099

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *et al.*, *Appellants;*

v.

MARY T. GRACE, *et al.*, *Appellees.*

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF FOR APPELLEES

SEBASTIAN K. D. GRABER*
NORMAN A. TOWNSEND
BRADLEY S. STETLER
Counsel for Appellees
GRABER, STETLER & TOWNSEND
1019 King Street
Post Office Box 146
Alexandria, Virginia 22313
(703) 548-2110
**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether peaceful political expression which is unrelated to the administration of justice and which is not basically incompatible with the normal use of the sidewalk surrounding the Court is protected by the First Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. PEACEFUL POLITICAL EXPRESSION WHICH IS UNRELATED TO THE ADMINISTRATION OF JUSTICE AND WHICH IS NOT BASICALLY INCOMPATIBLE WITH THE NORMAL USE OF THE SIDEWALK SURROUNDING THE COURT IS PROTECTED BY THE FIRST AMENDMENT	13
A. Section 13k prohibits a broad range of both innocent and expressive activity	13
B. Absolute bans against pristine and time-honored forms of expression violate the First Amendment	23
C. The First Amendment protects peaceful expression in public places like sidewalks and streets	24
D. The Government has not demonstrated that § 13k serves a compelling State interest	26
E. Congress already has acted to protect the precise interest asserted by the Government	27
F. Peaceable expression on the sidewalk surrounding the Court is not basically incompatible with normal use of the sidewalk	29
G. Because of the Supreme Court's unique constitutional status as a branch of government, interests in preserving the appearance of justice do not justify a wholesale ban on expression throughout the Court's grounds	32
H. Vesting the Marshal with standardless and absolute discretion for enforcement of § 13k violates the First Amendment	36

Table of Contents Continued

Page

I. Even assuming the legitimacy of the Government's asserted interest in preserving the appearance of justice, § 13k is both fatally overinclusive and underinclusive 37

J. Section 13k's absolute prohibition is not "de minimis" 39

II. SECTION 13k VIOLATES DUE PROCESS CONSIDERATIONS OF BOTH THE FIRST AND FIFTH AMENDMENTS 40

A. Section 13k is unconstitutionally vague 40

B. In light of the Marshal's arbitrary policy of enforcement, § 13k violates equal protection principles 41

C. Section 13k is unconstitutional as applied ... 42

III. THE APPEARANCE OF PARTIALITY WHICH NATURALLY AND REASONABLY ARISES FROM THIS COURT RULING ON THE CONSTITUTIONALITY OF A STATUTE THAT APPLIES ONLY TO SUPREME COURT GROUNDS REQUIRES EACH JUSTICE TO CONSIDER MANDATORY DISQUALIFICATION UNDER 28 U.S.C. § 455 43

A. Except for the Chief Justice and Justice O'Connor, only those Justices who agree that interests unique to the Supreme Court justify an absolute ban of expression on Court grounds need disqualify themselves under 28 U.S.C. § 455(b) 43

B. The Chief Justice and Justice O'Connor must disqualify themselves under mandatory provisions of 28 U.S.C. § 455(b) 45

CONCLUSION 47

TABLE OF AUTHORITIES

CASES: Page

Adderley v. *Florida*, 385 U.S. 39 (1966) 31

Bigelow v. *Virginia*, 421 U.S. 809 (1975) 36

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 42

Bridges v. *California*, 314 U.S. 252 (1941) 13, 35

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 21

Brown v. *Hartlage*, 102 S.Ct. 1523 (1982) 10, 34

Cabell v. *Chavez-Salido*, 102 S.Ct. 735 (1982) 37, 38

Carey v. *Brown*, 447 U.S. 455 (1980) 38, 42

Citizens Against Rent Control v. *Berkeley*, 102 S.Ct. 434 (1981) 26, 34

City of Mesquite v. *Aladdin's Castle, Inc.*, 102 S.Ct. 1070 (1982) 40

Cox v. *Louisiana*, 379 U.S. 559 (1965) 28, 29-30

Craig v. *Harney*, 331 U.S. 367 (1947) 35

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 38

Flower v. *United States*, 407 U.S. 197 (1972) (*per curiam*) 24, 31

Globe Newspaper Co. v. *Superior Court*, 102 S.Ct. 2613 (1982) 12, 35

Gooding v. *Wilson*, 405 U.S. 518 (1972) 36

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) . 7, 31, 40

Greer v. *Spock*, 424 U.S. 828 (1976) 24, 31

Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) 23, 30-31

Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976) 40, 41

In re R.M.J., 102 S.Ct. 929 (1982) 28

Jamison v. *Texas*, 318 U.S. 413 (1943) 23

Jeannette Rankin Brigade v. *Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd mem.*, 409 U.S. 972 (1972) 20-21, 32, 40

Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) 31

Kunz v. *New York*, 340 U.S. 290 (1951) 40

Table of Authorities Continued

Page

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 26, 34-35

Larson v. *Valente*, 102 S.Ct. 1673 (1982) 10, 24

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 31

Lovell v. *Griffin*, 303 U.S. 444 (1938) 23

NAACP v. *Claiborne Hardware Co.*, 102 S.Ct. 3409 (1982) 10

New York v. *Ferber*, 102 S.Ct. 3348 (1982) 21, 37, 38

Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972) 41-42

A Quaker Action Group v. *Morton*, 460 F.2d 854 (D.C.Cir. 1971), *aff'd in part, remanded in part*, 516 F.2d 717 (D.C.Cir. 1975) 12

Redrup v. *New York*, 386 U.S. 767 (1967) 12

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 35

Schad v. *Borough of Mt. Ephraim*, 452 U.S. 61 (1981) 12

Schneider v. *State*, 308 U.S. 147 (1939) 23, 39

Schweiker v. *Hogan*, 102 S.Ct. 2597 (1982) 41

Smith v. *Goguen*, 415 U.S. 566 (1974) 40

Spence v. *Washington*, 418 U.S. 405 (1974) 39

Talley v. *California*, 362 U.S. 60 (1960) 23

Terminiello v. *Chicago*, 337 U.S. 1 (1949) 12

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 36

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 27, 31

United States v. *Ebner*, No. M-12487-79 (D.C. Super. Ct. Jan. 22, 1980), *appeal pending*, No. 80-165 (D.C.) 3-4, 21-22, 37, 41

United States v. *Nixon*, 418 U.S. 683 (1974) 39

United States v. *Turner*, No. M-5572-79 (D.C. Super. Ct. Oct. 2, 1979), *appeal pending*, No. 80-115 (D.C.) 4, 21

United States v. *Will*, 449 U.S. 200 (1980) 43

Table of Authorities Continued

Page

United States Postal Service v. *Greenburgh Civic Association*, 453 U.S. 114 (1981) 26, 30

Village of Schaumburg v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) 24

Watt v. *Energy Action Educational Foundation*, 102 S.Ct. 205 (1981) 13

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 39

CONSTITUTION, STATUTES AND RULES:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V 10, 40-42, 47

U.S. Const. amend. VI 10

18 U.S.C. § 1507 (1976) ..... *passim*

28 U.S.C. § 455 (1976) 12-13, 43-46

40 U.S.C. § 13a (1976) 28

40 U.S.C. § 13c (1976) 9

40 U.S.C. § 13f (1976) 9, 15, 16, 17

40 U.S.C. § 13g (1976) 9, 17

40 U.S.C. § 13h (1976) 9

40 U.S.C. § 13i (1976) 9

40 U.S.C. § 13k (1976) ..... *passim*

40 U.S.C. § 13*l* (1976) 9, 14, 28

40 U.S.C. § 13m (1976) 9

40 U.S.C. § 13o (1976) 9

40 U.S.C. § 13p (1976) 9, 15, 16, 17, 28

40 U.S.C. § 161 (1976) 15

40 U.S.C. § 193a (1976) 16

40 U.S.C. § 193g (1976) 12, 15, 16, 19, 20, 21

22 D.C. Code § 3102 (1981) 3

Rules of Procedure in the United States District Court for the District of Columbia (1972) (Rule 1-9) 5

The Supreme Court Rules, Rule 10.4 (1980) 45

Table of Authorities Continued

Page

MISCELLANEOUS:

1 Annals of Cong. 434, 738 (J. Gales ed. 1789) 32-33

H. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960) 40

95 Cong. Rec. 7958 (1949) 15, 17

95 Cong. Rec. 8962 (1949) 16

H.R. 4948, 81st Cong., 1st Sess. (1949) 15, 16, 17, 18

H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351 43

Hearings on the Nomination of Sandra Day O'Connor Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 34

Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. Before the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) 34

House Comm. on the Judiciary, Policing of the Supreme Court Building and Grounds, H.R. Rep. No. 814, 81st Cong., 1st Sess. (1949) 11, 15, 16, 18

House Comm. on the Judiciary, Prohibiting the Picketing of United States Courts, H.R. Rep. No. 1281, 81st Cong., 1st Sess. (1949) 11, 19

J. Madison, *Notes of Debates in the Federal Convention of 1787* (Norton 1966) 47

Newsweek (Oct. 5, 1981) ..... 22, 4[illegible]

Senate Comm. on the Judiciary, Prohibiting the Picketing of Courts, S. Rep. No. 732, 81st Cong., 1st Sess. (1949) 11, 19

Senate Comm. on the Judiciary, United States Supreme Court—Building and Grounds—Policing, S. Rep. No. 719, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S. Code Cong. & Ad. News 1827 ..... 11, 17

Senate Comm. on Public Works, Security of the Capitol Buildings and Grounds, S. Rep. No. 573, 90th Cong., 1st Sess. (1967) 20

Table of Authorities Continued

Page

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 45
Time (Oct. 5, 1981) 22, 45
The Washington Post, Sept. 13, 1982 34
The Washington Star, Jan. 6, 1981 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1863

UNITED STATES OF AMERICA, *et al.*, *Appellants;*

v.

MARY T. GRACE, *et al.*, *Appellees.*

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF FOR APPELLEES

STATUTORY PROVISIONS INVOLVED

40 U.S.C. § 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

18 U.S.C. § 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Other relevant statutory provisions are set forth in the Appendices[1] to Appellees' Motion to Affirm (M.A.App. 31a-33a) (40 U.S.C. §§ 13a-13p) and Brief on the Merits (Grace App. 1a-3a).

STATEMENT

A. Facts

In May 1978 appellee Thaddeus Zywicki, an elderly Catholic missionary, stood alone on the sidewalk near the curb line in front of the Supreme Court near a coin-operated *Washington Star* vending machine (M.A.App. 1a-21a, 4a)(Complaint, *Grace* v. *Burger*, No. 81-1205 (D.D.C. filed May 13, 1980 ¶ 12).[2] Mr. Zywicki was distributing a handbill which contained a reprint of a letter to the editor of *The Washington Post* from a

---

[1] References to the various appendices filed with the Court shall be as follows:

Appendix to Jurisdictional Statement (J.S.App.)

Appendix to Motion to Affirm (M.A.App.)

Appendix to Appellees' Brief on the Merits (Grace App.)

Also, certain transcripts relevant to this case, and other non-record material, have been filed with the Clerk as "Lodging Filed on Behalf of Appellees (filed November 15, 1982)(Exhibits A-G)(hereinafter, e.g., Lodging Exhibit B 33)."

[2] Since the District Court dismissed appellees' Complaint for failure to exhaust administrative remedies (J.S.App. 69a), the facts outlined in the Complaint are to be taken as true. Both the Government and the District Court have accepted the factual allegations of the Complaint (J.S.App. 3a & n.3, 56a).

The District Court's ground for dismissal has never been advanced or adopted by the Government. (*See* Brief for Appellants at 3 n.2; *Grace* v. *Burger*, J.S.App. 1a-47a, 5a-8a); and Brief for [Government] Appellees in the Court of Appeals at 4 ("we do not advance the exhaustion of administrative remedies reasoning of the District Court . . .").

United States Senator concerning the subject of removal of unfit federal judges (M.A.App. 4a, 11a)(Complaint ¶ 12 and Exhibit 1 to Complaint). A Supreme Court police officer approached Mr. Zywicki and informed him that Title 40 of the federal code prohibited the distribution of leaflets on Supreme Court grounds, which included the sidewalk abutting the curb (M.A.App. 4a-5a). Fearing arrest, Mr. Zywicki left the grounds.

On January 8, 1980, Mr. Zywicki returned to the sidewalk in front of the Court, this time distributing handbills containing an invitation to attend a religious meeting termed "a religious reflection in solidarity with the oppressed peoples of Central America" (M.A.App. 5a, 12a)(Exhibit 2 to Complaint). An officer soon approached Mr. Zywicki and ordered him to cease leafletting or face arrest. Fearing arrest, Mr. Zywicki again left (M.A.App. 5a).

In February, 1980, Mr. Zywicki once again attempted to distribute leaflets on the sidewalk in front of the Court near the newspaper vending machines (M.A.App. 5a-6a). Counsel had informed Mr. Zywicki that a judge of the Superior Court of the District of Columbia, in a criminal prosecution under 40 U.S.C. section 13k, had narrowed the application of § 13k to conduct performed with the specific intent to influence, impede or obstruct the administration of justice (*See* M.A.App. 5a-6a, 18a-19a)(Lodging Exhibit B).[3] When Mr. Zywicki informed counsel that he wanted to distribute handbills concerning hu-

---

[3] In *United States* v. *Ebner*, No. M-12487-79 (D.C.Super.Ct. Jan. 22, 1980) (Hannon, J.), demonstrators against the death penalty staged mock executions across the street from the Court. Those who had been "executed" were carried across the street and laid upon the steps of the Court, where they were arrested and charged with two counts of violating 40 U.S.C. § 13k ("unlawful parading" and "unlawful device") and one count charging unlawful entry under 22 D.C. Code § 3102 (1981). Defendants, among whom was appellee Grace, filed motions to dismiss, attacking the facial constitutionality of § 13k. A transcript of the oral argument has been filed with the Clerk

man and political oppression in Guatamala, counsel informed Mr. Zywicki that § 13k, as narrowed by the Superior Court, would allow such leafletting (M.A.App. 5a).

On February 4, 1980, again peaceably standing near the vending machines and the curb line, Mr. Zywicki distributed a few handbills, but was soon approached by a Supreme Court police officer who warned Mr. Zywicki that unless he ceased leafletting, he would be arrested. Mr. Zywicki stated that he understood the statute had been modified by a judge (M.A.App. 6a). The officer used a walkie-talkie and apparently called someone inside the Supreme Court building. Eventually a Mr. White emerged from the building and informed Mr. Zywicki that the statute had not been changed and that Mr. Zywicki was subject to arrest for leafletting on Supreme Court grounds (*id.*). Mr. Zywicki protested the fact that the newspapers were allowed to be sold and distributed while he was prohibited from distributing printed matter of his choosing (M.A.App. 6a), and asked why the statute did not forbid raising and lowering the American flag, displayed on the outside grounds of the Court (*id.*). To avoid arrest, however, Mr. Zywicki once again left the grounds of the Court (*id.*). Fearing arrest, he has not returned (M.A.App. 6a).

Appellee Grace, upon learning of these events, became alarmed that a statute could prohibit peaceful expression on

---

(Lodging Exhibit B). The Government appealed Judge Hannon's limiting construction to the District of Columbia Court of Appeals (*U.S.* v. *Ebner*, No. 80-165) where it was consolidated with another case which challenged the facial constitutionality of § 13k, *United States* v. *Turner*, No. 80-115. The cases were argued on November 25, 1980, reargued in February, 1982, and proceedings have been deferred pending resolution of the case at bar.

A copy of the transcript of oral argument challenging § 13k in *United States* v. *Turner*, No. M-5572-79 (D.C.Super.Ct. Oct. 2, 1979)(Hess, J.) has been filed for the Court's convenience (Lodging Exhibit A).

the grounds of the Court (M.A.App. 4a). Therefore, on March 17, 1980, Ms. Grace stood on the Supreme Court sidewalk near the curb line and just a few feet from the newspaper vending machines with a sign (measuring approximately four feet by two and a half feet) inscribed with the *verbatim* text of the First Amendment (M.A.App. 4a, 6a). She stood in a peaceable, orderly manner, had no intent to interfere with the Court's work, and did not even know whether the Court was in session (M.A.App. 6a-7a). Rather, *"[h]er purpose was to communicate the message of the First Amendment in a public place peculiarly suited for such a message"* (M.A.App. 7a)(emphasis added).

Shortly after noon, a Supreme Court police officer, appellant Drexhagen, ordered Ms. Grace to leave the grounds of the Court and go across the street, citing 40 United States Code (M.A.App. 7a). Ms. Grace asked the officer if he had read her sign and, if so, why she had to move, stating that she had just as much right as the newspapers to be present (M.A.App. 7a). Officer Drexhagen informed Ms. Grace that she would have to follow him inside the building if she refused to move and, fearing arrest, she left the Court grounds (M.A.App. 7a). Ms. Grace is eager to exercise her First Amendment rights on the Court grounds and would return but for the spectre of arrest (M.A.App. 7a).

B. Proceedings In The District Court

On May 13, 1980, appellees Grace and Zywicki filed a verified[4] Complaint in the District Court seeking declaratory and injunctive relief on the grounds that § 13k, both on its face and as applied, abridges the First and Fifth Amendments

---

[4] Under Rule 1-9 of the Rules of Procedure in the United States District Court for the District of Columbia (1972), a "verified" document may be used wherever the Federal Rules require submission of a sworn affidavit.

(M.A.App. 1a-10a).[5] The parties filed cross-motions for summary judgment and supporting documents. The only material factual dispute was whether § 13k was selectively enforced.

The motions for a preliminary injunction and for summary judgment were argued in the District Court on June 11, 1980 (M.A.App. 39a-57a)(Lodging Exhibit C). During this hearing, Government counsel conceded that § 13k, by its terms, renders unlawful the placing and maintaining of newspaper vending machines on the Court grounds (M.A.App. 51a-56a). Subsequent to argument on the motion, the Government filed "Defendant's Supplemental Memorandum" (R.Doc. 6) in which the Government conceded that there were newspaper vending machines on the grounds of the Court. "Therefore, there is no disputed fact" (Defendants' Supplemental Memorandum 2)(filed June 23, 1980) (R.Doc. 6).

Although none of the parties presented or argued the issue, the District Court dismissed the Complaint for failure to exhaust administrative remedies, holding that Ms. Grace and Mr. Zywicki should have applied to the Marshal for a permit (J.S.App. 65a-69a).[6]

C. Proceedings In The Court Of Appeals

The Court of Appeals held that dismissal for failure to exhaust administrative remedies was "plainly erroneous" (J.S. App. 5a). In light of the undisputed facts and because all parties had briefed and argued the merits of § 13k's con-

---

[5] The Complaint alleged, *inter alia*, that § 13k was vague, overbroad, acted as a prior restraint, and violated the equal protection principles of the Fifth Amendment's due process clause.

[6] There are no available procedures for seeking a permit to engage in expressive activity on Supreme Court grounds (*see Grace* v. *Burger*, J.S.App. 5a-8a). Moreover, Marshal Wong's Affidavit clearly states that *no* expressive activity on the Court's grounds is allowed (M.A.App. 38a), thus rendering futile any attempt to seek a permit.

stitutionality, the Circuit Court reached the merits of the case and held § 13k unconstitutional on its face as repugnant to the First Amendment[7] (J.S.App. 2a., 8a-9a & n. 9).

In reaching this conclusion, the Court of Appeals first noted that § 13k, as interpreted by the Marshal, prohibits all expressive conduct, including all leafletting, picketing and even lone, solitary sign-holding, on Supreme Court grounds (J.S.App. 2a, 6a). Although the court recognized that some public property may be dedicated to uses which are inconsistent with First Amendment activity, and that the interest in preserving the integrity of the judicial process in the public mind is a legitimate governmental interest (J.S.App. 20a-21a), the court followed the guiding principle of *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972), which focuses upon "whether the manner of expression is basically incompatible

---

[7] The Government, in attempting to persuade the Court of Appeals to rehear the case *en banc*, mischaracterized the holding of the panel majority. As illustrated below, the Government's cast of the court's holding bears little resemblance to the actual holding of the court, which premised its ruling on the fact that the primary interest asserted by the Government is specifically protected by 18 U.S.C. § 1507:

Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc:*

"The panel . . . held that the Supreme Court grounds constituted a 'public forum' . . ." (*Id.* at 6, R.Doc.23);

"The sole basis for the majority's decision was its determination that the Supreme Court grounds constitute a public forum" (*Id.* at 10).

Grace v. *Burger:*

"Since we are unable to find any other significant governmental interest to justify the *absolute* prohibition of *all* expressive conduct contained in 13k, we hold that the statute is unconstitutional and void" (J.S.App. 2a)(emphasis supplied). (*Accord*, J.S.App. 27a).

with the normal activity of a particular place at a particular time" (J.S.App. 19a-20a), an issue which the Government never addressed (J.S.App. 25a).[8]

The court also noted that, while Congress had acted in specific furtherence of the appearance of justice interest in enacting 18 U.S.C. § 1507, the legislative history of § 13k does not discuss the appearance of justice but only maintaining the dignity of the Court (J.S.App. 22a-23a, nn. 17, 18). Since § 13k prohibits activity unrelated to the administration of justice, the court found § 13k's absolute ban overinclusive (J.S.App. 24a-26a). Applying the overbreadth standing doctrine (J.S.App. 27a) the court held the statute void on its face (J.S.App. 2a, 27a) and therefore did not reach the issue of the statute's application to Ms. Grace and Mr. Zywicki.

The Court of Appeals considered whether § 13k could be saved by a limiting construction, but found that, in view of the legislative history (M.A.App. 34a) and the "decades of consistently broad enforcement" (J.S.App. 27a-29a), the statute was not susceptible to a limiting construction.

Judge MacKinnon dissented on the ground that § 13k could be saved by a limiting construction narrowing its application to prohibit the propagandizing and promotion of political parties, organizations, or movements for various causes (J.S.App. 32a).

D. Statutes Applicable To Supreme Court Grounds

There is, in addition to § 1507, a statutory scheme specifically applicable to the Supreme Court grounds (of which section

---

[8] Significantly, prior to oral argument before the Court of Appeals, the court took judicial notice of a newspaper article appearing in *The Washington Star* on January 6, 1981 (M.A.App. 26a), which contained a photograph and a story depicting the filming of "The First Monday in October" on the steps of the Supreme Court (M.A.App. 22a-30a). The events depicted in the *Star* photograph and news article were thus incorporated into the record of this case.

13k in a part)(M.A.App. 31a-33a). Under this scheme duties relating to the care and custody of the Supreme Court building are delegated to the Marshal of the Supreme Court, who is deemed the "superintendent" of the building. 40 U.S.C. § 13c (*id.*). Section 13f empowers the Marshal, "under the general supervision and direction of the Chief Justice," to employ special officers to police the grounds (M.A.App. 32a). Section 13h renders it unlawful to "offer or expose any article for sale" in the building or on the grounds or "to display any sign, placard, or other form of advertisement therein; or to solicit . . . subscriptions or contributions therein" (*id.*). Sections 13i and 13g prohibit various forms of disorderly conduct as well as prohibiting the making of any "harangue or oration" or using any "loud, threatening or abusive language" in the building or grounds (*id.*).

A significant provision in the statutory scheme is § 13*l* which empowers the Marshal to prescribe regulations (subject to approval of the Chief Justice and publication), "as may be deemed necessary . . . for the maintenance of suitable order and decorum within the Supreme Court Building and grounds" (M.A.App. 32a).

Section 13o allows the Marshal to suspend application of sections 13g-13k "to permit the observance of authorized ceremonies" within the building or grounds (M.A.App. 33a). Finally, section 13p defines the "grounds" of the Court basically as encompassing the block upon which the Court is located, up to the face of the curbs of the sidewalk surrounding the grounds (*id.*). Under § 13m prosecutions under the scheme are to be in the Superior Court for the District of Columbia (*id.*). A violation of § 13k may result in a fine of $100 and/or 60 days incarceration.

SUMMARY OF ARGUMENT

The issue in this case is whether a statute which bans all forms of expression—including innocuous pristine expression unrelated to the administration of justice—anywhere on the grounds of the judicial branch of government is consistent with

the First Amendment. The Government urges the Court to hold that the Court's grounds constitute a vacuum in which the First Amendment has no application. Thus, the Government asks the Court to elevate itself above every other court, every other branch and agency of government, and even above the Constitution itself.

This Court consistently has held that peaceful political expression lies at the "core" of the First Amendment. *NAACP* v. *Claiborne Hardware Co.*, 102 S.Ct. 3409, 3427 (1982); *Brown* v. *Hartlage*, 102 S.Ct. 1523, 1528 (1982). The Government lacks power to reach or restrict the hard core of any fundamental right, particularly those guaranteed by the First Amendment. Each fundamental constitutional provision creates a zone of "hard core" protection inpenetrable by government. For example, just as the Sixth Amendment absolutely forbids the Government from depriving a criminal defendant of the right to trial by jury, the Fifth Amendment absolutely forbids *forcing* the involuntary testimony of a criminal defendant. Likewise, the Government lacks power to absolutely prohibit all forms of peaceful expression occurring anywhere on government property regardless of the normal uses of the place and regardless of the need for the restriction.

Moreover, any regulation which even incidentally trespasses upon protected expression must serve a recognized and compelling state interest. To survive scrutiny, any constraint imposed must be 1) unrelated to the suppression of expression, 2) closely tailored to the furtherence of a compelling interest, and 3) not unduly restrictive of First Amendment freedoms. *Larson* v. *Valente*, 102 S.Ct. 1673, 1685 (1982); *Brown* v. *Hartlage*, *supra*, 102 S.Ct. at 1529.

The primary justification asserted by the Government in support of section 13k—protection of the appearance of justice—is not mentioned anywhere in the legislative history. That precise interest, however, specifically motivated the *same* Congress that enacted § 13k to consider legislation of which (now) 18 U.S.C. § 1507 was a part. In stark contrast to § 13k's sparse legislative history, the legislative history of

§ 1507 reflects acute Congressional concern for striking a proper balance between the governmental interest in protecting the integrity of the administration of justice and the individual and societal interest in protecting peaceful political expression.[9] None of the other asserted governmental interests—relating to decorum or the symbolic value of the Court—justifies an absolute ban on both political expression and even innocent assemblages throughout the Court's grounds. Indeed, if the Supreme Court is a symbol of anything, it is a symbol our commitment to civil liberty, freedom of expression, and equal justice under law.

Significantly, the Government has never offered evidence to demonstrate that § 13k is a narrowly drawn restriction which substantially furthers a compelling, legitimate interest in a manner least restrictive of First Amendment rights.

Even if the Court recognizes as compelling the interest in preserving the appearance of justice on Court grounds, § 13k is overinclusive in prohibiting both expressive and innocent associational activity *unrelated* to the administration of justice. Section 13k also is fatally underinclusive because the Government would allow demonstrations in or across the street from the Court, "at locations that scarcely diminish their impact" (Brief for Appellants 23)(hereinafter, Government Brief). Thus, under the Government's own argument, § 13k still allows activity which directly threatens the very interest asserted in its defense.

Enforcement of § 13k is left to the arbitrary, standardless discretion of the Marshal. This has created not only the danger but the reality of selective enforcement. Film producers have

---

[9] *Compare* S.Rep. No. 719, 81st Cong., 1st Sess. 3 (1949), *reprinted in* 1949 U.S.Code Cong. & Ad. News 1827 (M.A.App. 34a-36a) *and* H.R.Rep. No. 814, 81st Cong., 1st Sess. 2 (1949)(Grace App. 5a), *with* S.Rep. No. 732, 81st Cong., 1st Sess. 4 (1949)(Grace App. 14a) *and* H.R.Rep. No. 1281, 81st Cong., 1st Sess. 3 (1949)(Grace App. 17a). *See* section I(A)(2), *infra*.

been allowed to film commercial movies on the Court steps, *The Washington Post* continues to this day to disseminate its written opinions and analyses, while Ms. Grace and Mr. Zywicki are threatened with arrest.

Section 13k's vague, overinclusive terms reflect the antiquated law that it is. Its predecessor, 40 U.S.C. § 193g—which has been held facially unconstitutional—was enacted in 1882, long before development of modern First Amendment standards. Its absolute prohibition of pure expression is an insult to the First Amendment. Forms of expression far less deserving of protection than the pristine rights at issue here have received broad solicitude by the Court. *E.g.*, *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61 (1981)(live—including nude—entertainment); *Redrup* v. *New York*, 386 U.S. 767 (1967)(pornography). Even disruptive speech is accorded protection. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Also, interests at least as, if not more, compelling than those offered here have not sufficed to justify subordination of a fundamental constitutional right. *See Globe Newspaper Co.* v. *Superior Court*, 102 S.Ct. 2613 (1982)(interest in protecting minor victims of sexual abuse did not justify mandatory closure of trial during minor victim's testimony); *A Quaker Action Group* v. *Morton*, 460 F.2d 854, 860 (D.C.Cir. 1971) (interest in safety of the President insufficient to justify broad restrictions of First Amendment rights), *aff'd in part, remanded in part*, 516 F.2d 717 (D.C.Cir. 1975).

Finally, since this case involves the Court itself, the provisions of 28 U.S.C. § 455 raise the issue of disqualification. The Chief Justice, as a party, must disqualify himself under § 455(b)(5)(i) and Justice O'Connor who, along with the Chief Justice, is depicted in photographs "standing" in an "assemblage" (Lodging Exhibit F 171) and "moving" in a "procession" (Lodging Exhibit G 173), should also consider disqualification under §§ (b)(1) and (b)(5)(iv). Appellees submit that the other members of the Court need not recuse themselves, except for those Justices who agree with the Government's argument

that—for whatever reason—interests unique to this Court justify an absolute ban on expression applicable *only* to the apex of the judicial branch of government.

Congress, in enacting § 13k, erected an iron curtain of silence around the seat of an entire branch of government. Contrary to the Government's glib assurance that § 13k is a narrow, minimal intrusion on protected rights, necessary to instill public confidence in the integrity and dignity of the Court, the truth is that:

> an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.
>
> *Bridges* v. *California*, 314 U.S. 252, 270-71 (1941)(Black, J.).

ARGUMENT

I. PEACEFUL POLITICAL EXPRESSION WHICH IS UNRELATED TO THE ADMINISTRATION OF JUSTICE AND WHICH IS NOT BASICALLY INCOMPATIBLE WITH THE NORMAL USE OF THE SIDEWALK SURROUNDING THE COURT IS PROTECTED BY THE FIRST AMENDMENT

A. Section 13k Prohibits A Broad Range Of Both Innocent And Expressive Activity

1. The starting point of any statutory analysis is the language used by Congress. *Watt* v. *Energy Action Educational Foundation*, 102 S.Ct. 205, 213 (1981). Title 40 U.S.C. § 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

As Judge MacKinnon observed in the court below, the statute is divisible into two parts (J.S.App. 31a)(MacKinnon, J., dissenting). The first part forbids parading, or moving in proces-

sions or assemblages, as well as standing in assemblages. It applies only to groups (*id.*), but it does not require that the group be engaged in expressive activity since the second clause of § 13k, which does concern expressive activity, is in the disjunctive rather than the conjunctive. Thus, contrary to the Government's argument that § 13k does not prohibit private discussions on Court grounds (*see* Government Brief 13-14 n. 4), the plain language of the statute prohibits standing in assemblages, regardless of the purpose of the assemblage.

The second part of the statute proscribes displaying on Court grounds "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Even Judge MacKinnon acknowledged that "[a]lthough 'flag' and 'banner' may describe a readily identifiable group of objects, the inclusion of the word 'device' makes difficult the task of limiting these three terms to a particular class of objects" (J.S.App. 32a). In fact, "it would appear that the reach of 'device' would include any object that is capable of display . . ." (*id.*).

The Government's characterization of § 13k as a narrow statute which minimally intrudes upon speech (*e.g.*, Government Brief 32, J.S.App. 6) is an exercise in verbal gymnastics. The fact is, § 13k's sweeping, vague terms evince no consideration whatsoever for fundamental First Amendment concerns. Enforcement of the statute is left to the standardless discretion of the Marshal (as supervised by the Chief Justice) and the Supreme Court police. Although 40 U.S.C. § 13*1* empowers the Marshal to promulgate regulations and standards of enforcement (*see Grace* v. *Burger*, No. 80-1205)(D.D.C. Aug. 7, 1980)(Oberdorfer, J.) (J.S.App. 63a)(*see* Lodging Exhibit C 97-99) the only regulation ever enacted under § 13*1* concerns the hours during which the Court is open to the public (J.S.App. 6a n. 6). The longstanding practice of the Marshal is to enforce § 13k against all expressive activities, including lone leafletting and stationary signholding (Declaration of Marshal Wong, M.A.App. 38a; Government Brief 3).

2. The scope of both actual and potential application of § 13k is discussed *infra*, at I(A)(3), but before examining the sweeping scope of § 13k, it is extremely valuable to detail its legislative history.

Until October 1935, the Supreme Court was housed in the United States Capitol building. Protection and policing of the Capitol building and grounds was governed by 40 U.S.C. § 161 *et seq.* (Act of Aug. 15, 1876). Section 193g, which originally was enacted in 1882, provided:

> It is forbidden to parade, stand, or move in processions or assemblages in said United States Capitol Grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement, except as hereinafter provided in sections 193j and 193k of this title [allowing suspension of § 193g for authorized ceremonies].[10]

(Grace App. 3a).

When the Supreme Court moved into its present building, the building and grounds were policed by officers commissioned by the District of Columbia. *See* H.R.Rep. No. 814, 81st Cong., 1st Sess. 1-2 (1949)(Grace App. 4a-5a); 95 Cong. Rec. H7958 (June 20, 1949)(statement of Rep. Bryson)(Grace App. 8a).[11] In 1949, however, legal advisors to the District of Columbia determined that the District lacked authority to commission officers to police the Court. *Id.* "As a result, the entire Supreme Court went into conference and this bill was really drawn at the suggestion of, if not actually by, the members of the Supreme Court." *Id.*[12]

---

[10] There are no House or Senate reports, debates, or hearings reflecting Congress' reasons for promulgation of § 193g. Apparently, it was not a controversial matter.

[11] Representative Bryson was a member of the House Judiciary Committee which authored the report on H.R. 4948, now codified as 40 U.S.C. §§ 13f-13p.

[12] In June 1949, the Court consisted of Chief Justice Vinson and Justices Black, Frankfurter, Rutledge, Douglas, Murphy, Reed, Burton, and Jackson. Justice Minton commenced service on October

The legislative scheme of which § 13k is a part closely tracks 40 U.S.C. §§ 193a-g. Basically, Congress extended to the Court the scheme which had been protecting the Capitol grounds since 1882. Congressman Celler, who was Chairperson of the House Judiciary Committee which authored the House Report on H.R. 4948, 81st Cong., 1st Sess. (1949)(now §§ 13f-p), explained:

> all this bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself—no more and no less.
>
> 95 Cong. Rec. H8962 (July 6, 1949) (statement of Rep. Celler)(debate concerning H.R. 4948)(Grace App. 9a).

Accord, H.R.Rep. No. 814, 81st Cong., 1st Sess 1 (1949)(Grace App. 4a).

Congress' only articulated purpose in enacting § 13k was to preserve the dignity and decorum of the Court's grounds. The House Report curtly states:

> It is the belief of the Committee on the Judiciary that in keeping with the dignity of the highest Court in the land, provision should be made for the policing of its building and grounds similar to that which is made for the United States Capitol.
>
> H.R.Rep. No. 814, 81st Cong., 1st Sess. 2 (1949)(Grace App. 5a).

12, 1949, and Justice Clark began service on August 24, 1949.

The House Report indicates that §§ 13f-13p were drafted by Mr. Perley, legislative counsel to the House of Representatives, at the request of then Marshal Thomas E. Waggaman. H.R.Rep. No. 814, 81st Cong., 1st Sess. 2 (1949)(Grace App. 5a). When the District of Columbia determined that it lacked authority to commission special police officers for the Court, the Chief Justice directed the Marshal "to have a bill prepared similar to the legislation providing for the Capitol Police." *Id.* Mr. Perley then drew up a bill "modeled upon the Capitol Police legislation," *id.*, and submitted it "to the Court for its approval." *Id.* The Court approved the bill subject to unspecified changes which were made on May 26, 1949. *Id.*

The Senate Report mirrored a similar concern:

> In keeping with the dignity which should surround the Supreme Court of the United States and the building and grounds which house it, the committee feel that this legislation should be enacted promptly.
>
> S.Rep. No. 719, 81st Cong., 1st Sess. 2 (1949), *reprinted in* 1949 U.S. Code Cong. & Ad. News 1827, 1829 (M.A.App. 34a, 36a).

The only debate on H.R. 4948 was in the House. Representative Anderson criticized § 2 (now § 13g) as making criminal the innocent act of walking on the grass. 95 Cong. Rec. H7958 (June 20, 1949)(statement of Rep. Anderson)(Grace App. 8a). The following colloquy constitutes the only reference to the proposed scheme's impact on First Amendment rights:

> Mr. Bryson: I am sure, knowing the gentleman as I do, that he would know the Supreme Court would be as reasonable about these matters as the Commissioners have been or as the police officers have been. Since I have been in Congress I remember seeing pickets marching in and around the Supreme Court Building.
>
> Mr. H. Carl Anderson: I do not object to section 6 [now § 13k] concerning which the gentleman is speaking, but I do object to these people who happen to step upon the grass, without knowing of such a penalty, being subject to this penalty . . .
>
> Mr. Bryson: I am sure the gentleman knows that similar provisions are written into the law protecting the Capitol and its grounds. I have not heard of any flagrant restrictions on the part of any legitimate use of the building or grounds.
>
> *Id.*

Thus, the only expressive activity specifically sought to be precluded by § 13k was the marching of pickets and the only governmental interest articulated in support of the scheme was the promotion of the dignity and decorum of the Court. Sections 13f-13p were enacted into law in 1949. Pub.L. No. 81-250, 63 Stat. 617 (Aug. 18, 1949).

The cursory legislative history relating to § 13k suggests that promulgation of the statute was a perfunctory, housekeeping measure, designed to apply to the Court the legislative scheme which had, since 1882, governed the Capitol and which, until 1935, had governed the Court itself. The Government, however, portrays § 13k as the product of a considered Congressional judgment to insulate the Court from *all* outside influence, an objective only partially accomplished by 18 U.S.C. § 1507. Congress, the Government argues, specifically intended § 13k to reach conduct beyond the pale of § 1507, conduct which may be misperceived by the public as influencing the Court, regardless of the true nature of the activity (Government Brief 30, 32, 36).

This argument, however, is premised upon the mistaken assumption that Congress first enacted 18 U.S.C. § 1507 and later, because of the unique constitutional status of the Supreme Court, enacted § 13k to provide protection beyond that offered by § 1507. Actually, comparative analysis of § 13k and § 1507 weakens rather than strengthens the Government's theory. The fact is that while both § 13k and § 1507 were introduced in and considered by the 81st Congress (1st session), § 13k was enacted by that Congress while § 1507 was not enacted until 1950.[13] Pub.L. No. 81-831, 64 Stat. 1018, c. 1024, Title I, § 31(a)(Sept. 23, 1950)(M.A.App. 59a). See n. 9, *supra*. The legislative purpose underlying § 13k is not to provide protection to the Court beyond that provided by § 1507; rather it "is based upon the law relating to the Capitol Buildings and Grounds." H.R.Rep. No. 814, 81st Cong., 1st Sess. 3 (1949) (Grace App. 6a).

Analysis of the legislative history of 18 U.S.C. § 1507 provides several important insights relevant to a determination of § 13k's constitutionality. Section 1507 was but one provision of

---

[13] In fact, § 1507, which was part of H.R. 5647, was introduced into the 81st Congress, 1st session, *after* § 13k, which was part of H.R. 4948.

the Internal Security Act of 1950, 64 Stat. 1018 (1950), which entailed a massive legislative effort to control the activities of communists in the United States. Both the Senate and House Reports indicate that § 1507 was enacted in specific response to the recent phenomena of mass demonstrations occurring outside federal courthouses during trials of alleged Communist Party members. *See* S.Rep. No. 732, 81st Cong., 1st Sess. 2 (1949)(Grace App. 12a). Section 1507 was intended to prohibit influence-picketing of pending cases by large crowds, which was seen as denigrating the dignity of the federal courts. *Id.* In stark contrast to the legislative history of § 13k, Congress, before enacting § 1507, carefully considered its impact on First Amendment rights and narrowly tailored the statute to accomplish Congress' objective without unduly infringing upon protected expression:

> Serious consideration has been given to the possibility that this legislation would interfere with the fundamental rights of picketing and free speech. However, it is the opinion of the committee that this statute does not interfere with those rights to such an extent as to render it unconstitutional. It is submitted that this bill is a proper and constitutional restriction on the right of picketing. Nor does your committee believe that it is an undue restriction on freedom of speech within the area protected by the first amendment of the Constitution. The legislation denounces as a crime only that picketing, parading, or causing noises which interferes with the administration of justice.
>
> H.R.Rep. No. 1281, 81st Cong., 1st Sess. 3 (1949)(Grace App. 17a).

Accord, S.Rep. No. 732, 81st Cong., 1st Sess. 4 (1949)(Grace App. 14a).

Comparative analysis of the respective legislative histories of 40 U.S.C. § 193g, 40 U.S.C. § 13k and 18 U.S.C. § 1507 compels the following conclusions: *first*, § 13k tracks the language of, and was modeled after, 40 U.S.C. § 193g; *second*, Congress, in enacting § 193g in 1882 did not consider its First

Amendment implications;[14] *third*, 40 U.S.C. § 13k was adopted to fill the gap created by the District of Columbia's determination that it lacked authority to commission Supreme Court police officers. The Eighty-first Congress did not consider the First Amendment implications of § 13k beyond one statement on the House floor about picketers marching in front of the Court. *Fourth*, § 13k was introduced into legislation *prior to* and was considered *without reference to* 18 U.S.C. § 1507. *Finally*, Congress enacted § 1507 specifically to protect the integrity of the courts in the public mind.

3. The prohibitions of § 13k are so absolute that truly uniform, content-neutral enforcement of its literal terms would lead to absurd results. Indeed, in *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F.Supp. 575, 586 (D.D.C.) (three-judge court), *aff'd mem.*, 409 U.S. 972 (1972)(hereinafter *Jeannette Rankin II*) the court discussed the Government's recommendation to place a narrowing construction on § 193g, noting:

> without such judicial emendations, so the Government forcefully argues, the present language of the statute is open to absurdities which Congress cannot be taken to have intended.[15]

---

[14] Congress did address these concerns in 1967 in Hearings Before the Subcommittee on Public Works, 90th Cong., 1st Sess. (1967). At that time, David Bress, then United States Attorney for the District of Columbia, recognized that § 193g's "outright prohibition without any regulatory steps" created substantial First Amendment problems. *See Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F.Supp. 575, 586 n. 14 (D.D.C.)(three-judge court), *aff'd mem.* 409 U.S. 972 (1972). The proposal to rescind § 193g's absolute prohibition was rejected over strong dissent, but the subcommittee at least acknowledged the First Amendment impact of the regulatory framework. *See* S.Rep. No. 573, 90th Cong., 1st Sess. 2, 5 (1967)(Grace App. 19a, 22a).

[15] The Government argued that the phrase "flag, banner or device" should "include picket signs, placards, and billboards, but not lapel-pins, buttons, name cards, insignias or armbands." *Jeannette Rank-*

Appellees Grace and Zywicki clearly have standing under the Overbreadth doctrine to challenge the statute on its face, and may raise examples of unconstitutional applications to situations not before the Court. *See, e.g., New York* v. *Ferber*, 102 S.Ct. 3348, 3360-61 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-16 (1973). Examples of the overinclusiveness of § 13k need not be hypothesized, however, for the Government itself, in various stages of this and related cases (*see* n. 3, *supra*) has indicated several absurd examples of what it considers prohibited by § 13k.

During argument addressed to the facial constitionality of § 13k in the Superior Court for the District of Columbia in *United States* v. *Turner*, No. M-5572-79 (D.C.Super.Ct. Oct. 2, 1979)(Lodging Exhibit A), the following colloquy occurred between the court and Government counsel:

> The Court: The statute doesn't use the word, picket. Mr. Stetler's concern is that if he would walk up to the Supreme Court and have on the back of his jacket some sign indicating that he was advocating everybody join the Democratic Party, or the Republican Party, or some other party, that he would be in violation of the statute because he's displaying a device which is designed to bring in public notice some organization.
>
> [AUSA] Holmes: That's exactly right, Your Honor.
>
> (Lodging Exhibit A 34).

A similar exchange occurred in *United States* v. *Ebner*, No. M-12487-79 (D.C.Super.Ct. Jan. 22, 1980)(Lodging Exhibit B):

> The Court: What does that mean . . . any flag, banner or device designed or adapted to bring into public notice any

---

in II at 586 n. 13. The Government also suggested that "section 193g should not be read literally as forbidding all assemblages, but that it should be taken as providing that there may be no assemblages larger than 15 in number." *Id.*

party, organization or movement. I gather the Iranian flag would do that as well as the American Flag, wouldn't it? What does that mean?

[AUSA] Cornell: Well, I think, Your Honor, that it means that you can't do it.

The Court: You can't carry an American flag on the grounds of the Supreme Court of the United States?

[AUSA] Cornell: Yes, Your Honor.

The Court: Isn't that patent nonsense? They put the flag up in the doorstep every morning, don't they?

[AUSA] Cornell: Well—

The Court: They can do it but others can't.

[AUSA] Cornell: I think that that is the Government's position in this case, Your Honor.

The Court: Well, it seems to me that the Government has to do better, Mr. Cornell.

(Lodging Exhibit B 81).

When Government counsel was asked by the Circuit Court of Appeals in this case whether T-shirts with insignia or mottos were banned from the Court grounds by § 13k, Mr. Lawrence responded, "I'm not sure, Your Honor. I am not sure how that would be addressed" (M.A.App. 73a).

In light of these alarming admissions, the Court should not hesitate to hold § 13k violative of the First Amendment. By its terms it forbids time-honored expression as well as wholly innocent associational activity. The statute's prohibition of standing or moving in "assemblages" clearly applies to groups posing for photographs or filming on the Court grounds (*see* M.A.App. 22a-30a (filming of "First Monday in October"); Lodging Exhibit E 169 (photograph of Island Trees School Board and Steven Pico)). A literal reading of § 13k clearly compels the conclusion that even members of the Court who have posed for photographs outside the Court have violated the statute. *See, e.g., Newsweek* 25 (Oct. 5, 1981)(Lodging Exhibit F 171); *Time* 22 (Oct. 5, 1981)(Lodging Exhibit G 173).

B. Absolute Bans Against Pristine And Time-Honored Forms Of Expression Violate The First Amendment

The fundamental right to distribute handbills was recognized in *Lovell* v. *Griffin*, 303 U.S. 444 (1938), which involved an ordinance that flatly banned the distribution of literature of any kind within the city without first obtaining permission from the city authorities. Lovell was arrested for distributing a religious tract concerning the "Kingdom of Jehovah" without first obtaining a permit. 303 U.S. at 448. This Court reversed, elucidating an inviolable principle of Constitutional law that has survived intact to this day: the First Amendment protects a peaceful leafletter on the public street from the strictures of any licensing law, permit or solicitation laws, or any other form of prior restraint. The *Lovell* Court instructed that freedom of the press "necessarily embraces pamphlets and leaflets," *id.* at 452, and emphasized that leaflets represent expression in its most pristine and coveted form and which "indeed have been historic weapons in the defense of liberty as the pamphlets of Thomas Paine and others in our history abundently attest." *Id. Accord, Schneider* v. *State*, 308 U.S. 147, 160 (1939).

Although the Government may prescribe narrowly drawn regulations pertaining to the time, place or manner of expression, § 13k's absolute prohibition of all forms of expression can only be described as forbidding expression at any time, in any manner, at any place on Supreme Court grounds. Absolute bans on pristine expression, such as § 13k, have not fared well in this Court. *E.g., Talley* v. *California*, 362 U.S. 60 (1960)(city ordinance prohibiting distribution of anonymous handbills); *Jamison* v. *Texas*, 318 U.S. 413 (1943)(local ordinance prohibiting distribution of handbills on the city streets). *Cf. Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 655 n. 16 (1981)(emphasizing that the state fair's booth rule was not a "total ban on protected First Amendment activity").

The breadth of protection afforded on-the-street leafletting under *Lovell, Schneider, Jamison* and *Talley* approaches absolute protection for orderly, public leafletting during

reasonable hours. This is evidenced by the Court's consistent solicitude for the freedom of citizens to solicit door to door for religious, charitable or political causes, despite the paramount public interest in preserving the privacy of the home from unwanted or fraudulent solicitors. *Larson* v. *Valente*, 102 S.Ct. 1673 (1982); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980).

C. The First Amendment Protects Peaceful Expression In Public Places Like Sidewalks And Streets

Whatever else may be said about the nature of the grounds of the Court, it must be admitted that the Court is surrounded by a public sidewalk with all its accouterments, including newspaper vending machines, a bus stop, and pedestrian and vehicular traffic. In fact, it could be described very much like the Court described New Braunfels Avenue, the street at issue in *Flower* v. *United States*, 407 U.S. 197, 198 (1972)(*per curiam*).

The Government argues that the Court's grounds are more akin to the boot camp of Fort Dix at issue in *Greer* v. *Spock*, 424 U.S. 828 (1976), than the street at issue in *Flower*. In *Greer*, however, the base commander had *never* opened the base to the form of expression Spock and others wished to exercise. Here, because the Supreme Court police have allowed the presence of newspaper vending machines only a few feet from where appellees sought to exercise their rights,[16] the Government has allowed some organizations to disseminate their written views while denying that same right to others. No governmental interest, however compelling, can justify according such disparate treatment to the same medium of expression.

---

[16] In May 1980, when the Complaint was filed, both *The Washington Star* and *The Washington Post* maintained vending machines in front of the Court (J.S.App. 3a, 4a). As of October, 1982, *The Washington Post* and an adult-oriented tabloid entitled *Met Forum* maintained machines on the sidewalk in front of the Court.

Contrary to the Government's hollow contention that there is no evidence of selective enforcement of § 13k,[17] the Government itself has acknowledged that the presence of the newspaper vending machines violates § 13k:

> Mr. Lawrence: . . . we believe that the statute is uniformly applied to personal conduct . . .
>
> The Court: Mr. Lawrence, I hear you. That machine didn't walk there, it got there by somebody's personal conduct. An agent of the Washington Post put it there. Why isn't his putting it there unlawful? He is displaying a device . . .
>
> Mr. Lawrence: Well, Your Honor, again—
>
> The Court: That person has violated this statute, hasn't he, as it is written?
>
> Mr. Lawrence: It may very well be, Your Honor.
>
> The Court: How could it not be?
>
> Mr. Lawrence: I am not sure, Your Honor. I don't know how it could not be.
>
> (M.A.App. 55a-56a).

Under these circumstances, the Government lacks "standing" to argue § 13k is a "content-neutral" statute uniformly applied to all.

---

[17] *See* Government Brief 13 n. 3. As detailed in appellees' Statement, *supra*, at 5 & n. 4, 6, a record was developed through the filing of a verified Complaint, Statements of Material Facts Not in Dispute, admissions made by the Government during hearings, and by the Court of Appeals taking judicial notice of the filming of a movie on the steps of the Court. It is interesting to note that the Government does not hesitate citing the Declaration filed by Marshal Wong as part of "the record" yet this Declaration, accompanying the Government's Motion for Summary Judgment, stands on the same evidentiary footing as the facts relied upon by appellees to support the claims of discriminatory enforcement.

D. The Government Has Not Demonstrated That § 13k Serves A Compelling State Interest

The Government argues that § 13k was enacted to serve the compelling interest of preserving the appearance of justice. As demonstrated above, however, the legislative history belies this notion. Justifications not evident in the legislative history are "not entitled to the same weight as the purposes that actually motivated Congress." *United States Postal Service* v. *Greenburgh Civic Ass'n*, 453 U.S. 114, 153 n. 2 (1981)(Stevens, J., dissenting). Allowing the Government to advance as the primary interest justifying § 13k a concern that was unaddressed by Congress ignores the principle that restrictions on expression must be narrowly drawn to regulate *specific* conduct within the Government's regulatory power.

This Court has required "more than assertion and conjecture," *Landmark Communications Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978), from the Government to support a claim that a particular statute furthers a compelling interest. Where the Government seeks to curtail protected First Amendment rights, the Government bears the burden of producing *evidence* indicating the statute is necessary to serve a recognized and compelling interest. In *Citizens Against Rent Control* v. *Berkeley*, 102 S.Ct. 434, 439, 441 (1981), the Court found Berkeley's failure to produce any such evidence to be a prominent flaw in the city's case. Every member of the Court drew attention to the city's failure to support the claim that a limitation on contributions on behalf of ballot measures was necessary to preserve the integrity of the referendum process—an admittedly legitimate interest. *See* 102 S.Ct. at 439 (Burger, J.), 439 (Rehnquist, J., concurring), 441 (Marshall, J., concurring), 441 (Blackmun, J., with O'Connor, J., concurring).

In the case at bar, the Government has yet to offer a scintilla of evidence indicating either the existence of a compelling governmental interest, or that an asserted interest is *substantially* furthered by § 13k. Nor can the Government hope to evade this requirement by invoking the interest in the "appearance of justice" as a talisman before which the com-

mands of the First Amendment evaporate. Where First Amendment rights are involved, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

E. Congress Already Has Acted To Protect The Precise Interest Asserted By The Government

Assuming, *arguendo*, the Court allows the Government to advance an interest neither articulated in the legislative history nor proven to be genuinely threatened by the exercise of pristine expression, this interest already is served by virtue of 18 U.S.C. § 1507. As detailed in part I(B), *supra*, Congress' concern to protect federal witnesses, jurors and court officials from influence-picketing during ongoing criminal cases resulted in promulgation of § 1507. The Court of Appeals found that § 1507 "fully addressed" the appearance of justice interest (J.S.App. 22a). The Government's assertion that Congress intended § 13k to provide protection beyond that offered by § 1507 is unsupported by the legislative histories of either section.

The Government's remarkable claim that § 13k is narrower than § 1507 not only defies logic and common sense, but ignores previous admissions by the Government concerning the breadth of § 13k (*Compare*, Government Brief 9, 22 n. 7, 32, *with* Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11 (R.Doc. 23)).

The Government's other argument—that invalidation of § 13k would compel the Supreme Court police to rely exclusively on § 1507, with its inherently "content-oriented" focus—is inapposite to the question of § 13k's constitutionality. At bottom, the Government's real complaint concerns the relative difficulty of prosecuting a case under § 1507, as compared to § 13k. This difficulty, however, reflects Congress' effort to closely tailor § 1507 to the specific evil sought to be avoided in a manner least intrusive of other, more protected forms of ex-

pression. Finally, *Cox* v. *Louisiana*, 379 U.S. 559 (1965)(*Cox II*) indicates that in the typical case contemplated by § 1507—influence-picketing about a pending case—circumstantial and direct evidence normally provides ample proof of the intent to influence. In short, picketing a courthouse with a sign reading "Acquit defendant Smith" is one thing; silently standing on Supreme Court grounds with a sign inscribed with the words of the First Amendment is quite another.

The other interests asserted in support of § 13k relate to the dignity and decorum of the Court. These interests, however, are protected by the other unchallenged provisions of 40 U.S.C. §§ 13a-13p (M.A.App. 31a-33a). These sections prohibit, *inter alia*, the sale of commerical material, the discharge of firearms, the making of harangues or orations, and the use of threatening or abusive language on Court grounds. More importantly, § 131 empowers the Marshal to promulgate such regulations "as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds . . . and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds . . ." (M.A.App. 32a).

Thus, there simply is no need for § 13k. Certainly, no showing has been made that less restrictive alternatives have been attempted but found inadequate. *See In re R.M.J.*, 102 S.Ct. 929, 939 (1982). The regulatory authority § 131 vests in the Marshal provides ample means for the Court to preserve dignity and decorum by narrowly drawn regulations directed toward the time, place and manner of expression.

Most important, the Government itself:

> recognize[s], of course, that a single leafletter or demonstrator—or for that matter, most small crowds or a well-behaved large crowd—will usually not create an actual danger of *real or perceived* intimidation of the judiciary.
>
> (Government Brief 25 n. 9)(emphasis added).

F. Peaceable Expression On The Sidewalk Surrounding the Court Is Not Basically Incompatible With Normal Use Of The Sidewalk

The Government seeks to exploit the fact that § 13k applies only to this Court in an effort to frame an argument that the Court's public grounds are not a "public forum" and therefore may be totally closed to persons seeking to exercise their rights. Citing *Cox II* and other "public forum" cases, the Government argues that the Court's grounds are more like a boot camp or a letter box than the public sidewalk that it is. However, neither *Cox II* nor any of the other cases cited by the Government support the theory that a branch of the national Government may be entombed in a coffin of silence.

First, *Cox II* concerned a mass demonstration of 2,000 persons picketing across the street from a *state* courthouse regarding a *pending* criminal case. The Court was careful to point out that "[w]e are not concerned here with such a pure form of expression as a newspaper comment . . . but with expression mixed with conduct." 379 U.S. at 564. *Second*, the Court specifically noted that the statute at issue (which tracked the language of 18 U.S.C. § 1507) was "narrowly drawn to punish specific conduct that infringes a substantial state interest." 379 U.S. at 564. The statute was based on the specific legislative finding that influence-picketing creates a danger that the public might misperceive the effect of mass demonstrations upon the administration of justice. *Third*, the *Cox II* Court emphasized that the narrow and precise terms of the statute left no room for arbitrary or selective enforcement. Section 13k, because of its absurd breadth, virtually *forces* the Marshal to selectively enforce its terms.

Fourth, the *Cox II* Court distinguished the narrow statute at issue from a broad statute prohibiting, for example, picketing "to protest the actions of a mayor or *other official* of a city *completely unrelated to any judicial proceedings*, who just happened to have an office located in the courthouse building." *Id.* at 567 (emphasis added). Here, the Government asserts

that the Supreme Court building contains "only the Court and related offices" (Government Brief 27). The Court should take judicial notice, however, that a multitude of activities occur in the Court wholly unrelated to the Court's Article III function. Also located in the Court, for example, are offices of the curator, clerk, librarian, administrative aides as well as a library, cafeteria, gift shop, exhibit area and a gymnasium.[18]

Fifth, mass influence-picketing of a state courthouse concerning a controversial pending case is qualitatively different than pristine expression exercised by a lone leafletter on the public sidewalk surrounding a branch of the national Government. Although the Supreme Court obviously is a court, its unique character as the only constitutionally required court distinguishes it from all other courts. *See* section I(G), *infra*. Moreover, neither witnesses nor juries frequent the Court's grounds, a fact which heavily influenced the drafters of 18 U.S.C. § 1507.

The other cases cited by the Government in support of its argument that peaceful expression may be prohibited on Supreme Court grounds are even less relevant than *Cox II*. In *United States Postal Service* v. *Council of Greenburgh Civic Association*, 453 U.S. 114 (1981), community civic associations seeking to place their circulars in residential letter boxes argued that the boxes were a "public forum." The Court, analyzing the traditional uses of letter boxes, rejected this claim noting that the association still could reach its intended audience merely by placing their circulars inside the resident's door.

In *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the Court upheld a state fair's rule

---

[18] If a recognized historian disagreed with the Supreme Court Historical Society's treatment of Chief Justice John Marshall, for example, § 13k would prohibit the historian from distributing leaflets in front of the Court explaining his or her view of the great Chief Justice.

that groups soliciting or selling articles must operate from a fixed location within the fairgrounds. The Court noted that ISKCON members were free to orally proselytize their views throughout the fairgrounds, 452 U.S. at 655, and that the booths were located in areas where visitors were expected. *Id.* at n. 16. More importantly, the Court distinguished the rule from a total ban, and noted the differences between a fairgrounds and a public street. *Id.*

Other cases such as *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Greer* v. *Spock*, 424 U.S. 828 (1976); and *Adderley* v. *Florida*, 385 U.S. 39 (1966), all involve places possessing unique characteristics which justify certain restrictions on First Amendment rights. None of these cases involved pure expression exercised upon or directed toward the apex of a branch of government.

Essentially, the "public forum" doctrine emerged as a response to the argument that the First Amendment forbids denying access to *any* government property. *See Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city transit vehicles). Where government property is normally open to the public without restriction, however, as in *Flower* v. *United States*, 407 U.S. 197 (1972), the Government's power to restrict protected expression depends upon "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). Where the exercise of a particular form of expression is not "basically incompatible" with the normal use of the place, the Government may not prohibit exercise of the expression, even when the location in question is in an area over which the Government has broad regulatory control. *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Grayned* itself involved picketing across from a school.

The Government has made no showing that the presence of a lone leafletter is "basically incompatible" with normal use of the sidewalk surrounding the Court. In light of the constant

influx of tourists, students, attorneys, and pedestrians on the Court sidewalk, it is doubtful such a showing ever could be made. The Government itself concedes that small groups of demonstrators pose no real or apparent threat to the administration of justice (Government Brief 25 n.9). Finally, it deserves note that the three-judge court in *Jeannette Rankin II* found that the public areas of the Capitol grounds "have traditionally been open to the public . . ." 342 F.Supp. at 584.

The last justification proffered in support of § 13k's absolute ban is the symbolic status of the Court as the "focus of aspirations for an independent judiciary" (Government Brief 38). But the grace and awesome beauty of the Supreme Court building naturally acheives this purpose, as does the epithet "Equal Justice Under Law" carved into the facade of the building. Moreover, if the Court symbolizes anything, it is the historically unique commitment of this nation to freedom of expression.

G. Because Of The Supreme Court's Unique Constitutional Status As A Branch Of Government, Interests In Preserving The Appearance Of Justice Do Not Justify A Wholesale Ban On Expression Throughout The Court's Grounds

The basic premise of the Government's contention that the First Amendment is inapplicable to Supreme Court grounds is that the judicial branch should not be subjected to political passions more properly addressed to the two elected branches of government. The first Congress, however, in debating the proposal which became the First Amendment, specifically rejected the notion of restricting the rights of petition and assembly to the Legislative branch.

Madison's original draft of the First Amendment, as proposed in the House of Representatives, provided:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.
>
> The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.
>
> 1 *Annals of Congress* 434 (J. Gales ed. 1789).

The final version, of course, guaranteed the right to petition "the Government" which obviously includes all *three* branches.

Thus, however compelling the governmental interest may be in preserving federal district and circuit courts from the appearance of injustice flowing from mob picketing, the weight of this interest diminishes with regard to pure expression exercised on Supreme Court grounds because of the Court's unique constitutional status as the seat of the judicial branch of government. While interests in decorum and dignity might justify regulating the time, place and manner of expression on Court grounds, an absolute ban contravenes the intent of the Framers to secure peaceful political expression from the repressive tendencies of government. As Madison explained to the first assembled House of Representatives, "The right of freedom of speech is secured; the liberty of the press is expressly declared to be *beyond the reach of this Government.*" 1 *Annals of Congress* 738 (J. Gales ed. 1789) (emphasis added).

The Supreme Court cannot avoid being a political institution. The Court's decisions have impacted on the lives of all Americans. Many issues which have divided the nation also have divided the Court. Yet the integrity of the Court, as an institution, and the public's respect for it, has not diminshed.

In recent years, the appointment of Justices has become a matter of political controversy. In the 1970's the Senate refused to confirm two of President Nixon's nominees to the Court. More recently, the nominations of Justices Rehnquist and O'Connor generated substantial publicity. Questioning during the Senate confirmation hearings touched upon several

of the most controversial issues of our times. *See Hearings on the Nomination of Sandra Day O'Connor before the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 107-08, 198-99, 218 (1981)(regarding views on abortion); *Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. Before the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. 33 (1971)(regarding views on the Vietnam War).

Significantly, the Court itself does not appear overly concerned about remaining independent of all outside influence. Several of the Justices, including the Chief Justice, have delivered speeches articulating their views on a variety of issues and subjects. Additionally, *The Washington Post* recently reported revival of the abandoned custom of the Justices dining with the President a few days before opening of the Court's term. *The Washington Post*, Sept. 13, 1982, at A3, col. 1. If the Court finds no appearance of justice problem in dining with the President (who has been a party to several cases in recent years), then surely that interest is not implicated by a lone leafletter addressing issues unrelated to the administration of justice.

Analytically, the governmental interest in preserving the appearance of justice is a subset of the more general interest in preserving the integrity of a governmental function or process. The Court has encountered, in a variety of contexts, First Amendment challenges to statutes designed to further such interests. *E.g.*, *Brown* v. *Hartlage*, 102 S.Ct. 1523, 1528 (1982) (integrity of the electoral process); *Citizens Against Rent Control* v. *Berkeley*, 102 S.Ct. 434, 438 (1981) (integrity of the referendum process); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978)(maintenance of confidence in the judicial system). The Court applied the rigorous strictures of First Amendment analysis to each of these cases and found the state had failed to sustain the heavy demonstration necessary to justify restricting rights of expression.

Landmark Communications reveals a significant countervailing interest against constricting access to the Court

grounds. As Chief Justice Burger aptly observed, "[t]he operations of the court and the judicial conduct of judges are matters of utmost concern." 435 U.S. at 839. The Court, in a long line of cases, has recognized that our commitment to self-rule requires that the judicial system be subject to both observation and comment. *E.g.*, *Globe Newspaper Co.* v. *Superior Court*, 102 S.Ct. 2613 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Bridges* v. *California*, 314 U.S. 252 (1941).

The *Bridges* line of cases establishes a strong policy favoring access to, and the right to comment about, courts. Although judges obviously are human, and therefore theoretically susceptible to influence, this does not mean they should be totally isolated from comment. If "it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions . . ." *Landmark Communications, supra*, 435 U.S. at 839 (Burger, J.), then surely Justices are able to withstand the innocuous presence of a solitary leafletter distributing handbills unrelated to the Court's function.

Finally, severing the Court grounds from reach of the First Amendment would deprive many people, particularly indigents, of any opportunity to persuade persons frequenting Court grounds of the merits of a particular issue. It is easy for the Government, with its unlimited resources, to say that poor people have nothing to lose if § 13k is upheld. The Government's frequent filing of *amicus curiae* briefs provides but one example of the Government's ready access to the Court. Contrary to the Government's claim that the financially distressed have no interest in being on Court grounds, presence on Court grounds affords accesss to some of the nation's leading constitutional lawyers. Who is to say that one of these attorneys might not be persuaded by a modest leaflet to contribute his or her time to a meritorious cause?

H. Vesting The Marshal With Standardless And Absolute Discretion For Enforcement of § 13k Violates The First Amendment

If the Marshal enforced the literal terms of § 13k, the statute undoubtedly would have been challenged and invalidated long ago. But § 13k is *not* uniformly enforced. Rather, the Marshal apparently has decided for himself what it allows and what it precludes. This the Constitution forbids. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

The District Court, for example, observed that "[a]rguably; neither section 13(k) (nor 18 U.S.C. § 1507), by their terms, reach an individual carrying a message on a sign or in pamphlets or leaflets, unassisted by any other person and without apparent attempt to interfere with or influence the Supreme Court or its officials" (J.S.App. 62a). The Marshal, however, interprets and applies § 13k to *all* expressive conduct.

The continued presence of *The Washington Post* and adult-tabloid vending machines, allowing filming of movies and other "assemblages," the daily lowering and raising of the flag, and the Metro bus stop sign are all prohibited by the express terms of § 13k. Yet the Marshal only enforces § 13k against persons exercising pristine First Amendment rights. Allowing *The Washington Post* to disseminate its particular views, while denying Mr. Zywicki and Ms. Grace the same opportunity, highlights not merely the *dangers* of selective enforcement inhering in § 13k's vague, overinclusive terms, but the *reality* of discriminatory application. This Court previously has emphasized that where a statute is properly challenged on overbreadth grounds, the facts of the case itself may " 'well illustrate the statute's potential for sweeping and improper application.' " *Bigelow* v. *Virginia*, 421 U.S. 809, 817 (1975), *quoting*, *Gooding* v. *Wilson*, 405 U.S. 518, 532-33 (1972). This is such a case.

I. Even Assuming The Legitimacy Of The Government's Asserted Interest In Preserving The Appearance Of Justice, § 13k Is Both Fatally Overinclusive And Underinclusive

The Court of Appeals found § 13k substantially overinclusive because it prohibits a broad range of activity unrelated to the administration of justice (J.S.App. 27a).[19] Counsel will not rehearse here the many previously cited examples of even innocent associational activity prohibited by § 13k. Unlike the statute upheld in *Cabell* v. *Chavez-Salido*, 102 S.Ct. 735, 740-41 & n.8 (1982), § 13k "is so broad and haphazard as to belie the state's claim that it is only attempting to ensure that an important function of government be in the hands of [citizens]." *Id.* at 741.[20]

Equally fatal to § 13k is its glaring underinclusiveness. Given the Government's primary argument that § 13k is necessary to serve the compelling interest in preventing any public misperception of the influence of demonstrations on the Court, it is difficult to see how demonstrations in or across the street from the Court—which the Government *would* allow—would not be seen by the public as potentially influencing the Court.

---

[19] In *Cabell* v. *Chavez-Salido*, 102 S.Ct. 735, 740-41 & n. 8 (1982), the Court noted a distinction between the constitutional doctrine of "overbreadth" and the claim that a statute is unconstitutionally "overinclusive." Overbreadth, the *Cabell* Court explained, is merely a doctrine of standing "applicable in certain First Amendment cases and under which litigants may assert the rights of others not presently before the Court." *Id.* Overinclusiveness refers to a statute which is so sweeping as to render unpersuasive any claim that it protects and furthers a compelling state interest. There are cases subsequent to *Cabell*, however, which continue to refer to overbreadth in the sense of overinclusiveness. *E.g.*, *New York* v. *Ferber*, 102 S.Ct. 3348, 3360-63 (1982).

[20] Judge Hannon, during oral argument in the Superior Court challenging the facial validity of § 13k, candidly observed, concerning the second portion of § 13k: "If that's not overbroad, I don't know what in the world is." *United States* v. *Ebner*, M-12487-79 (D.C. Super.Ct. Jan. 22, 1980) (Lodging Exhibit B 80).

The logical inconsistency in the Government's position results from its effort to persuade the Court that ample alternatives exist for expression (*e.g.*, Government Brief 7, 11, 14): "Section 13k leaves demonstrators free to choose a site for their expressive activity anywhere in the vicinity of the Supreme Court, and there is no reason to believe that they will be taken less seriously because they are not on the same square block as the Court itself" (Government Brief 17)(*Accord*, *id.* at 8 (demonstrations across the street would be "unlikely to attract less attention than a demonstration on the sidewalk in front of the Court")); *id.* at 23 n. 7 (§ 13k still allows demonstrations "at locations that scarcely diminish their impact").

Thus, § 13k suffers from the same sort of underinclusiveness that persuaded the Court in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), to strike down an ordinance against drive-in theatres showing films which included nude scenes visible from the public roadway. Failure of the statute to prohibit other sorts of activity which created the same risks to traffic rendered the ordinance fatally underinclusive. *See New York* v. *Ferber*, 102 S.Ct. 3348, 3359 & n. 18 (1982); *Cabell*, *supra*, 102 S.Ct. at 742 n. 12 (1982); *Carey* v. *Brown*, 447 U.S. 455 (1980). Also, candor requires recognizing that persons in a tourist bus who pass by the Court's grounds would be unable to distinguish a small, orderly demonstration from one of the many picture-taking and other assemblages routinely allowed by the Marshal.

To fully achieve the all encompassing interest in the appearance of justice asserted by the Government, a statute would have to prohibit all assemblages within a one-block radius of the Court. Only in this manner could the Government effectively prevent public misperception occasioned by the exercise of expression near the Court. Needless to say, such a statute would not fare well in this Court.

Indeed, if the Government truly were committed to the goal of preserving the appearance of the Court's impartiality, it would not have appealed this case for, by doing so, the *Govern-*

ment has created the appearance (if not the reality) of requiring the Court to decide a case in which the Court itself is involved.[21]

J. Section 13k's Absolute Ban On Expression Is Not "De Minimis"

The Government's argument that § 13k is but a minimal abridgement of liberty is incredible (Government Brief 6, 11, 13, 21). A leafletter who wants to reach persons frequenting the grounds of the Court cannot do so from across the street. Persons with signs would need placards the size of billboards in order to render their message visible to persons on Court grounds. More importantly, "one is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939); *accord*, *Spence* v. *Washington*, 418 U.S. 405, 411 n. 4 (1974).

Although the Court differs functionally from the Legislative and Executive branches, it is still a *co-equal* part of the Government. Its processes rightly are subject to public scrutiny. The Government's argument that the Court is an inappropriate place for expression ignores the decision of the Framers to render *each* branch of government accessible to the people. It is not surprising that the Government disagrees with the balance struck by the Framers in favor of freedom of ex-

---

[21] As discussed in section III, *infra*, except for the Chief Justice and Justice O'Connor, the Court need not disqualify itself *unless* the Court is of the view that, for whatever reason, the Court possesses some unique characteristic which elevates it above every other court, every other branch of government, and even above the Constitution itself. The separation of powers question raised by such a conclusion is formidable. Equally disturbing is the premise that a branch of government may, by fiat, exempt itself from whichever commands of the Constitution it finds inconvenient. *See United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

pression, but the Framers considered and rejected the notion of limiting the right of assembly to the Legislative branch of government. *See* H. Black, *The Bill of Rights*, 35 N.Y.U. L.Rev. 865, 879 (1960).

II. SECTION 13k VIOLATES DUE PROCESS CONSIDERATIONS OF BOTH THE FIRST AND FIFTH AMENDMENTS

A. Section 13k Is Unconstitutionally Vague

As noted in section I(A)(1), *supra*, even Judge MacKinnon acknowledged the vagueness of the term "device," which he concluded must "include any object that is capable of display" (J.S.App. 32a). The potential application of this term to include lapel pins and buttons led the Government in *Jeannette Rankin II* to argue for a limiting construction of the statute. 342 F. Supp. at 586 n. 13.

Due process of law requires that persons of ordinary intelligence be clearly apprised as to what the law allows and what it forbids. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 102 S.Ct. 1070, 1074 (1982); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). No one may be required at the peril of life, liberty, or property, to speculate as to the meaning of penal statutes. *Smith* v. *Goguen*, 415 U.S. 566, 572 n. 8 (1974). Moreover, where a statute has a potentially inhibiting effect on expressive activity, the statute is subject to strict judicial scrutiny. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976).

Vague laws like § 13k, which fail to provide explicit standards for those who apply them, invite arbitrary and discriminatory enforcement. *Grayned*, *supra*, 408 U.S. at 108; *Kunz* v. *New York*, 340 U.S. 290 (1951). Such laws operate, as has § 13k, to inhibit the exercise of First Amendment freedoms.

Thus, even if the Court finds § 13k consistent with other First Amendment principles, its incurable vagueness requires invalidation on First and Fifth Amendment due process

grounds.[22] Where even the lawyer for the Government is uncertain as to the statute's meaning (Lodging Exhibit D 163), the Court certainly cannot expect citizens of ordinary intelligence to understand what the law forbids.

Morover, vague laws are not susceptible to a limiting construction, *Hynes*, *supra*, 425 U.S. at 622, particularly where to do so would require the Court to rewrite the statute, which clearly is Congress' function. Even were the Court to consider a limiting construction, the record indicates that the officers on the scene are unlikely to follow it.[23] In these circumstances, a limiting construction is inappropriate.

B. In Light Of The Marshal's Arbitrary Policy Of Enforcement, § 13k Violates Equal Protection Principles

Assuming, *arguendo*, that a statute constitutionally could prohibit all expressive activity on Supreme Court grounds, § 13k, as enforced by the Marshal, allows some individuals and organizations to exercise their First Amendment rights while arbitrarily denying that same right to others. Allowing *The Washington Post* to *sell* its newspapers while threatening Mr. Zywicki with arrest for trying to *give away* his handbill violates the equal protection guarantees of the First and Fifth Amendments. *See Police Department of Chicago* v. *Mosley*,

---

[22] These arguments were advanced by appellees Grace and Zywicki in both the District Court and the Court of Appeals. Although the Circuit Court held the statute unconstitutional on First Amendment grounds, the Court has recognized that appellees may advance in this Court any grounds, based on the record, supporting the judgment below. *Schweiker* v. *Hogan*, 102 S.Ct. 2597, 2607 n. 24 (1982).

[23] In *United States* v. *Ebner*, *supra* at n. 3, Judge Hannon of the District of Columbia Superior Court placed a narrowing construction on § 13k to require proof of an intent to influence (*see* Lodging Exhibit B 90). This fact did not, however, persuade the Supreme Court police to narrow their interpretation of the statute as evidenced by the police ordering Mr. Zywicki off Court grounds on February 4, 1980 (*see* Complaint, ¶¶ 17-20, M.A.App. 6a).

408 U.S. 92, 95-96 (1972); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

C. Section 13k Is Unconstitutional As Applied

Should the Court uphold § 13k on its face, the Court nevertheless should hold § 13k unconstitutional in its application. The record of discriminatory enforcement brings § 13k within the rule of *Mosley*, *supra*, where the Court emphasized that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 408 U.S. at 95-96. *See Carey* v. *Brown*, 447 U.S. 455 (1980).

If the Court harbors any doubt concerning the adequacy of the record on this issue, appellees request the Court to remand the case for further development of the record.

III. THE APPEARANCE OF PARTIALITY WHICH NATURALLY AND REASONABLY ARISES FROM THIS COURT RULING ON THE CONSTITUTIONALITY OF A STATUTE THAT APPLIES ONLY TO SUPREME COURT GROUNDS REQUIRES EACH JUSTICE TO CONSIDER MANDATORY DISQUALIFICATION UNDER 28 U.S.C. § 455

A. Except For The Chief Justice And Justice O'Connor, Only Those Justices Who Agree That Interests Unique To The Supreme Court Justify An Absolute Ban Of Expression On Court Grounds Need Disqualify Themselves Under 28 U.S.C. § 455(b)

The primary justification asserted by the Government in support of § 13k is protection of the appearance of justice (Government Brief 38 & n. 16). Yet the Government, having thus asserted an interest applicable *only* to this Court, conspicuously fails to address the obvious disqualification issue[24] necessarily raised by 28 U.S.C. § 455 (1976).[25]

---

[24] The disqualification issue was initially raised by the Government (J.S. 14). Although noting "special concerns" relating to the Chief Justice (*id.*), the Government urged the other Justices to reach the merits, suggesting that "any doubts should be resolved against disqualification" (*id.* at 15). This assertion completely ignores the express Congressional intent in amending 28 U.S.C. § 455 to "enhance public confidence in the impartiality of the judicial system" by, *inter alia*, eliminating the judicially created "duty to sit" which required resolution of close cases against disqualification. *See* 28 U.S.C. § 455 (1976); P.L. No. 93-512, § 1, 88 Stat. 1609, Dec. 5, 1974. H.R.Rep. No. 1453, 93d Cong., 2nd Sess. 2 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6354-55.

[25] It could be argued that disqualification under 28 U.S.C. § 455 is a threshold question which must be resolved before turning to the merits of the case. *See United States* v. *Will*, 449 U.S. 200, 212 (1980). With the exception of the Chief Justice and Justice O'Connor, whose disqualifications are also required by other subsections of § 455(b), the timing for resolution of the question of disqualification is not

This "paramount" interest, however, is not what moved Congress to enact § 13k. It is what motivated promulgation of § 1507 one year *after* § 13k became law. If the Court agrees that § 1507 and other statutes amply protect the Court, or that § 13k violates traditional First Amendment tests, the members of the Court are not disqualified under 28 U.S.C. § 455(b)(5)(iii) because the Court has no interest which is greater than that possessed by the other branches of government, or which justifies the absolute ban on expressive conduct contained in § 13k. However, should any member of the Court accept the theoretical possibility that there exists an interest in this Court or its members which is greater than those interests identified and rejected with respect to the other branches of government, then automatic mandatory disqualification is required under § 455(b)(5)(iii) since every member of the Court would have an interest that "could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(5)(iii).[26]

---

critical to the outcome of the case since disqualification is unnecessary unless the Court accepts the Government's arguments on the merits. Therefore, rejection on the merits of the Government's defense of § 13k evaporates any grounds for mandatory disqualification. Logically, the Court must address the merits of the case in order to determine whether it has an interest which triggers the provisions of § 455.

[26] Each Justice also may be disqualified under § 455(a) which states that a Justice "shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Simply by asking the Court to rule on the constitutionality of § 13k, the Government has created a situation in which each Justice's impartiality could reasonably be questioned, thus requiring disqualification under § 455(a). However, unlike disqualification under § 455(b), disqualification under § 455(a) can be waived by the parties after "full disclosure on the record of the basis for disqualification," § 455(e). For that reason, the question of disqualification under § 455(a) properly must be addressed on the record at oral argument.

B. The Chief Justice And Justice O'Connor Must Disqualify Themselves Under Mandatory Provisions Of 28 U.S.C. § 455(b) Which Are Inapplicable To The Other Members Of The Court

Unlike the other members of the Court whose grounds for mandatory disqualification under 28 U.S.C. § 455(b)(5)(iii) disappear with the rejection of the Government's arguments in support of § 13k, the Chief Justice and Justice O'Connor must disqualify themselves under § 455(b) for other reasons. Specifically, the Chief Justice must disqualify himself because he is a party to the proceeding, § 455(b)(5)(i), because he has "personal knowledge of disputed evidentiary facts," § 455(b)(1) (for example, regarding policies of enforcement), and because he has an official interest which likely will be affected by the outcome of the case, § 455(b)(5)(iii).

Although the Chief Justice declined to appeal the decision of the court below, he remains an omitted party in this Court with an official interest in the case. As such, the Chief Justice is free to reenter the case at his will by merely notifying the Clerk of the Court and the parties that he has an interest in the appeal. Rule 10.4, The Supreme Court Rules. *See* R. Stern & E. Gressman, *Supreme Court Practice* § 6.20, 441-44 (5th ed. 1978).

Additionally, in light of the *Newsweek* (Lodging Exhibit F 171) and *Time* (Lodging Exhibit G 173) photographs depicting the Chief Justice and Justice O'Connor in processions and assemblages, both the Chief Justice and Justice O'Connor should disqualify themselves. The Government contends that the case contains no "findings" regarding selective enforcement of § 13k. Appellees have argued that ample proof of selective enforcement exists in the record, but that if additional proof is thought necessary a remand to the District Court for the taking of evidence is required. If the case is remanded, Justice O'Connor's family members, and perhaps even the Justice herself (and the Chief Justice), could be material witnesses in the trial of this matter on the question of dis-

criminatory enforcement, § 455(b)(5)(iv). Moreover, the Chief Justice and Justice O'Connor necessarily would possess "personal knowledge of disputed evidentiary facts" concerning the statute as applied, § 455(b)(1). In these circumstances, disqualification is appropriate.

CONCLUSION

The Framers, in response to the age-old query, "are we to act with greater purity than the rest of [hu]mankind," J. Madison, *Notes of Debates in the Federal Convention of 1787* 229 (statement of G. Bedford) (Norton 1966), drafted a Constitution founded on the principle that no person or agency of government is above the law; not the President, not the Congress, and certainly not this Court:

> Shall any [person] be above Justice? Above all shall that [person] be above it, who can commit the most extensive injustice?
>
> *Id.* at 331 (statement of G. Mason).

Appellees urge the Court to affirm the judgment of the Court of Appeals by holding that § 13k, on its face, is repugnant to the First and Fifth Amendments. In the alternative, appellees urge the Court to hold § 13k unconstitutional as applied, or, if the Court is uncertain about the sufficiency of the present record on this issue, to remand the case for development of a record.

However, any member of the Court who concludes that the Court possesses some unique characteristic which justifies exempting itself from the fundamental First Amendment precepts which it has applied to all *other* governmental agencies and officials, should invoke disqualification.

Respectfully submitted,

SEBASTIAN K. D. GRABER
NORMAN A. TOWNSEND
BRADLEY S. STETLER

Counsel for Appellees

GRABER, STETLER & TOWNSEND
1019 King Street
P.O. Box 146
Alexandria, VA 22313
(703) 548-2110

Supreme Court, U.S.
FILED
JAN 11 1983
ALEXANDER L. STEVAS
CLERK

No. 81-1863

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Adderly v. *Florida*, 385 U.S. 39 4
American Communications Association v. *Douds*, 339 U.S. 382 10
Broadrick v. *Oklahoma*, 413 U.S. 601 12
Carey v. *Brown*, 447 U.S. 455 4
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 4
Cox v. *Louisiana (Cox I)*, 379 U.S. 536 4
Cox v. *Louisiana (Cox II)*, 379 U.S. 559 ..... 4, 7
Cox v. *New Hampshire*, 312 U.S. 569 4
Grayned v. *City of Rockford*, 408 U.S. 104 ....6, 10, 12, 14
Greer v. *Spock*, 424 U.S. 828 4
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 4
Kovacs v. *Cooper*, 336 U.S. 77 4
Martin v. *City of Struthers*, 319 U.S. 141 4
New York v. *Ferber*, No. 81-55 (July 2, 1982) 13
Parker v. *Levy*, 417 U.S. 733 ..... 11, 12
Schneider v. State, 308 U.S. 147 4
Schweiker v. *Wilson*, 450 U.S. 221 6
United States v. *Mazurie*, 419 U.S. 544 11
United States v. *O'Brien*, 391 U.S. 367 ..... 4, 7
United States v. *Thirty-Seven Photographs*, 402 U.S. 363 13-14
United States Postal Service v. *Council of Greenburgh Civic Associations*, 453 U.S. 114 4
United States Railroad Retirement Board v. *Fritz*, 449 U.S. 166 6
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982) 11, 12
Young v. *American Mini Theatres*, 427 U.S. 50 11

Constitution and statutes:

United States Constitution, First Amendment 1-2, 5, 6, 7, 8, 11, 13
18 U.S.C. 1507 .....1, 2, 6, 7, 8, 14
28 U.S.C. 2106 14

Constitution and statutes—Continued Page

28 U.S.C. 2109 14
40 U.S.C. 13k ..... *passim*
40 U.S.C. 13*l* 8

Miscellaneous:

H.R. Rep. No. 814, 81st Cong., 1st Sess. (1949) 5
Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Supp. Ct. Rev. 1 6
S. Rep. No. 719, 81st Cong., 1st Sess. (1949) 5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1863

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

Appellees' disagreement with the government on the range of expressive activities that must be permitted near the Supreme Court is narrow. Appellees do not contend that they must be allowed to picket or leaflet within the Supreme Court building itself. See also ACLU Am. Br. 3 n.2. They also acknowledge that Congress may, and in 18 U.S.C. 1507 did, constitutionally bar from the Court grounds demonstrators who are attempting to influence the Court. At the same time, it is undisputed that speakers are permitted to demonstrate or leaflet (subject to 18

U.S.C. 1507) directly across the street from the Court, or in appropriate cases in the street in front of the Court.[1]

This case, therefore, concerns only whether Congress may prohibit persons who are not directly addressing the Court from demonstrating on the Court's "curtilage"—the sidewalks of the square block on which the Court is located.[2] Specifically, the question on which we differ with appellees is whether requiring such demonstrators to move across the street so severely invades First Amendment rights that Congress is forbidden to choose that means of promoting the undeniably substantial interests—tangible and symbolic—furthered by Section 13k. Appellees devote relatively little of their argument to this issue.

1. Appellees assert in only the most cursory fashion that Section 13k makes it more difficult for dem-

---

[1] Indeed, according to appellees, when appellee Grace appeared on the Court grounds with her placard, a Supreme Court police officer merely asked her to step across the street. Appellees' Br. 5.

[2] Appellee and amicus curiae American Civil Liberties Union insist upon characterizing Section 13k as an "absolute" bar. See, *e.g.*, Appellees' Br. 20, 23; ACLU Am. Br. 3, 6. On its face, Section 13k only regulates speech of a certain manner, public demonstrations—contrary to appellees (Br. 10, 14), Section 13k obviously does not apply to private conversations—in a certain place, the Supreme Court grounds. Every time, place, or manner restriction can be said to be an "absolute" prohibition of expression at a particular time or place or of a particular manner, but such characterizations do not advance analysis. Indeed, amicus curiae ACLU appears to acknowledge (Br. 7 n.8) that its description of Section 13k as an absolute bar is only a conclusory way of asserting its view that the alternative means of expression it leaves open are inadequate.

onstrators and leafleters to reach persons on the Supreme Court grounds (Br. 39). Amicus curiae ACLU similarly argues that Section 13k will make it more difficult for demonstrators and leafleters to reach "their intended audience" (ACLU Am. Br. 7, 8). But neither Section 13k nor any other regulation of expression would ever be challenged unless it had some effect on the ability of speakers to reach "their intended audience." The Court has never suggested that the Constitution bars every regulation of speech that does not "permit the speaker to reach the intended audience as readily" (ACLU Am. Br. 7-8). On the contrary, as we explained in our opening brief, the Court has repeatedly upheld regulations that appreciably reduced a speaker's audience or the impact of his expression. See Appellants' Br. 15-16 (citing cases).

Even the ACLU concedes that "individuals * * * [who] leaflet and picket across the street from the Court * * * are clearly visible from the Court grounds" (Br. 20). Many persons going to and from the Court will come face to face with speakers across the street. Appellees (Br. 39) and the ACLU (Br. 8) object that Section 13k will force demonstrators to make larger signs and will reduce the number of members of their intended audience with whom they come into face-to-face contact. But if any regulation of expressive activities is to be allowed, these burdens must be considered minimal. They do not remotely approach the burdens on expression—such as a total prohibition on all leafleting or door-to-door solicitation, or a prohibition that effectively makes it impossible to reach residents of a neighborhood—that have caused the Court to invalidate regulations in the past. See Appellants' Br. 16-17 (citing cases). Neither appellees nor amici cite any case in which this Court

has held that the Constitution forbids the imposition of such slight burdens on expression in order to promote substantial government objectives. Compare *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-655 (1981), *Adderly* v. *Florida*, 385 U.S. 39 (1966), *Kovacs* v. *Cooper*, 336 U.S. 77, 87-88 (1949) (opinion of Reed, J.), *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941), *Cox* v. *Louisiana (Cox I)*, 379 U.S. 536, 554-555 (1965), and *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 134-135 (1981) (Brennan, J., concurring), with *Carey* v. *Brown*, 447 U.S. 455, 468-469 n.13 (1980), *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943), *Schneider* v. *State*, 308 U.S. 147 (1939), and *United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring).[3]

2. Like the court of appeals, appellees and the ACLU (*e.g.*, ACLU Am. Br. 12, 14) appear to acknowledge the importance of the concrete interests we advance in support of Section 13k—the need both

---

[3] The ACLU is plainly incorrect in suggesting (Br. 13-14) that the government must accord the public broad rights of expression in any place to which public access is generally permitted. The public is not generally restricted from being "near" a courthouse, but in *Cox* v. *Louisiana (Cox II)*, 379 U.S. 559 (1965), the Court held that a regulation akin to a content-based restriction of speech (see Appellants' Br. 30) may be imposed on that area. The demonstration in *Cox II* occurred on a sidewalk. Moreover, the military base at issue in *Greer* v. *Spock*, 424 U.S. 828 (1976), was open to a wide variety of civilian activities (see *id.* at 831; *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980)), but the Court nonetheless held that even a content-based restriction, excluding certain political activities, could lawfully be enforced. This case, of course, does not involve a content-based restriction, and the scope of permissible government regulation is accordingly greater.

to protect the judiciary from intimidation and to prevent members of the public from believing that the Nation's highest Court can be influenced in its decision-making by public demonstrations. Appellees and the ACLU also do not appear to deny that Section 13k in fact furthers these interests by preventing demonstrators from closely approaching the Court. Instead, they assert that we are precluded from advancing these interests as justifications for Section 13k because they are not mentioned in the legislative history (*e.g.*, Appellees' Br. 8, 10, 26) and because these interests are protected by 18 U.S.C. 1507, which they consider a narrower restriction than Section 13k (*e.g.*, Appellees' Br. 8, 10, 27, 44; ACLU Am. Br. 5, 15-16, 21 n.20).

a. Appellees recognize (Br. 16) that Congress's stated purpose for enacting Section 13k was to protect the dignity and decorum of the Supreme Court. See S. Rep. No. 719, 81st Cong., 1st Sess. 2 (1949); H.R. Rep. No. 814, 81st Cong., 1st Sess. 2 (1949). This purpose fairly comprises the interest in protecting against the real or perceived intimidation of the Court and the interest in preserving the Court's symbolic connotations (see Appellants' Br. 33-39). Moreover, as appellees acknowledge (Br. 17), Congress was aware that Section 13k would apply to activities within the purview of the First Amendment. It is unrealistic and inappropriate to expect that the legislative history will go further and rehearse the constitutional justifications for a statute in the detail that would be found in an appellate brief. The Constitution does not require Congress to create any legislative history at all, and members of Congress, even while properly attentive to constitutional concerns,

often will not describe their actions in the terms that would be used in constructing a legal argument. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

The legislative history of Section 13k is more than sufficient to support the justifications we suggest. It shows that Section 13k is plainly not the product of legislative inadvertence or "thoughtless[ness]" (*Schweiker* v. *Wilson*, 450 U.S. 221, 239 (1981) (Powell, J., dissenting)). Moreover, as appellees concede, Congress did not ignore the First Amendment implications of Section 13k; while the enactment of Section 13k was not accompanied by the self-conscious weighing of First Amendment interests that accompanied the passage of Section 1507, that is undoubtedly because Congress—correctly—did not believe that the limited restriction imposed by Section 13k seriously burdens First Amendment rights. Nothing in the legislative history suggests that Section 13k was enacted for an illegitimate purpose. Most important, Section 13k is unlike, for example, a breach of the peace or disorderly conduct statute, because Congress unquestionably knew it was regulating expressive activities and little else when it enacted Section 13k; Section 13k is therefore "a deliberate, specific, and relevant legislative judgment" that expressive activity of a certain manner is inappropriate in a certain place. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 n.5 (1972), quoting Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 32; see Appellants' Br. 32.

b. Appellees and the ACLU, like the court of appeals, do not explain how the existence of Section 1507 can render Section 13k invalid when "it has never been

suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest" (*United States* v. *O'Brien*, 391 U.S. 367, 380 (1968)). In our opening brief, we explained that the two statutes are complementary (Br. 9-11, 27-32): by omitting the specific intent requirement of Section 1507, Section 13k reduces the opportunities for discretionary enforcement, necessarily based on the content of expression, that Section 1507 creates, and provides more complete protection against the real or perceived intimidation of the judiciary; and the principal reason for the specific intent requirement of Section 1507—to protect expression directed at an official unconnected to a court who happens to have an office in the same building (*Cox* v. *Louisiana (Cox II)*, 379 U.S. 559, 567 (1965))—is inapplicable to the Supreme Court.

Indeed, it is ironic that appellees and amici, who repeatedly assert their concern for First Amendment rights, should insist that Section 1507 is preferable to Section 13k. As the Court recognized in *Cox II*, *supra*, 379 U.S. at 568-569, the term "near" in Section 1507 presents significant vagueness problems and is prone to discriminatory enforcement; the geographical scope of Section 13k, by contrast, is defined with absolute precision. The specific intent requirement of Section 1507 is, as appellees and the ACLU recognize, akin to a restriction on the basis of content (Appellees' Br. 28; ACLU Am. Br. 17) and again leaves far more room for discretionary enforcement than Section 13k. Moreover, by appellees' and the ACLU's logic (see Appellees' Br. 11, 37; ACLU Am. Br. 15), Section 1507 is both underinclusive and overinclusive; not all expression that might be perceived as influencing a court

is intended to do so, and unquestionably not all expression that is intended to influence a court achieves its objective.

At bottom, appellees' argument that Section 13k is not narrowly tailored to the ends it promotes reflects a failure to recognize the practical difficulties of enacting any legitimate regulation that has an impact on expression—practical difficulties that Congress, unlike appellees, must face if it is to act. No regulatory measure can achieve a precise fit of means to ends; none can eliminate discretion entirely. The only alternatives to Section 13k suggested by appellees and amici are Section 1507—which serves important functions, and is well suited to courthouses that contain other official offices, but presents the difficulties we described—and the Marshal's open-ended, highly discretionary power under 40 U.S.C. 13*l* to issue regulations governing the Court grounds. See, *e.g.*, Appellees' Br. 28; ACLU Am. Br. 18. Section 13k reflects a balance that takes into account the divergent interests protected by the First Amendment—the interest in permitting expression and the interest in reducing the opportunities for discretionary enforcement—as well as the government's interests. Neither Section 13k nor any other statute can perfectly protect all of these interests at once; but appellees fail to show why Section 13k is not a reasonable accommodation, reached by a Congress specifically concerned with the dignity and decorum of the Supreme Court. Especially in view of the narrow range of disagreement between appellees and Congress (see pages 1-2, *supra*), this is more than enough to sustain the statute's constitutionality.

c. Appellees and amici do not question our assertion that Congress, in regulating public buildings and

grounds, may legitimately choose to advance symbolic objectives. Nor do they deny that Congress may, if it acts reasonably, limit the place or manner of expression in order to promote these objectives. They also do not question that the Supreme Court is a uniquely appropriate symbol of the calm reflection, free from insistent popular pressure, that should characterize the judicial process. Appellees and the ACLU do suggest that Congress was not actually concerned with symbolic objectives when it enacted Section 13k;[4] but even the court of appeals acknowledged (J.S. App. 23a-25a) that the dignity and decorum interests identified in the legislative history reflect an intention to promote symbolic objectives.[5]

Principally, however, appellees and amici take issue with Congress's decision to treat the building and grounds of the Supreme Court as a symbol of reflection and solemnity; they would rather the Court be a symbol of robust free expression (see, *e.g.*, Appellees' Br. 11, 32-33; ACLU Am. Br. 11; LULAC Am. Br. 4,

---

[4] Appellee and amici deny that Section 13k was intended to promote any of the objectives we attribute to Congress; but they do not explain what, in their view, Congress *was* attempting to do when it enacted Section 13k. Surely Congress must have had some objective in mind.

[5] The ACLU also appears to urge that since restrictions comparable to Section 13k applied to the Capitol grounds, Congress could not have been concerned with the symbolic functions of the Court. But the regulation of the Capitol grounds antedated Section 13k by many years. See Appellees' Br. 15. In any event, the fact that Congress attributed to other public buildings a symbolic importance that was later found inappropriate does not disqualify Congress from attempting to invest the Supreme Court with symbolic significance.

6-8, 24-29).[8] Similarly, appellees (Br. 38) and the ACLU (Br. 20) suggest that a restriction on expression will serve symbolic interests only if it is much broader than Section 13k; since we doubt that they would permit such a regulation to go unchallenged, this is tantamount to asserting that Congress cannot promote symbolic interests at all. In any event, plainly it is for Congress—not appellees or the courts—to determine the nature of the symbolic functions of public property and buildings, so long as Congress's choice is reasonable. Appellees do not show why Congress's choice here was unreasonable, suspect, or excessively restrictive.

3. Appellees also attack Section 13k by devising hypothetical examples that supposedly show that the terms of Section 13k can be interpreted to produce results that appellees consider absurd. See, e.*g.*, Appellees' Br. 21-22, 36. In itself this is a hollow exercise, unless appellees can establish that it entitles them to the relief they seek. "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [statutory] terms will be in nice question.' " *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 110 n.15, quoting *American Communications Association* v. *Douds*, 339 U.S. 382, 412 (1950). "The applicable standard, however, is not one of wholly consistent academic definition of abstract terms." *Ibid.*

Appellees appear to assert first that the existence of these hypothetical examples renders Section 13k vague. See, *e.g.*, Appellees' Br. 29, 36, 40-41. Since the decision of the court of appeals does not rest on this basis, appellees presumably offer it as an al-

[8] "LULAC Am. Br." refers to the brief filed by amicus curiae League of United Latin American Citizens.

ternative ground for affirmance. But appellees' own activities—picketing and leafleting—are unquestionably within the prohibition of Section 13k; appellees have not suggested that the language of Section 13k leaves any doubt about its application to this conduct. Appellees acknowledge that their intention was to engage in expressive activities and that they were told only that they could not leaflet or picket (Br. 3-5). Moreover, their complaint did not allege that they were uncertain whether actions in which they proposed to engage would be proscribed by Section 13k.

Appellees' vagueness contention is, therefore, a claim that some other person, not a party to this case, might be unsure whether Section 13k prohibits him from wearing, for example, a T-shirt with words on it on the Court grounds (see Appellees' Br. 22). But appellees, having "engage[d] in some conduct that is clearly proscribed[,] cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982), slip op. 5; see *Young* v. *American Mini Theatres*, 427 U.S. 50, 58-61 (1976); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").[7]

In addition, Section 13k, especially as interpreted by the Marshal, is not vague. The Marshal has stated that he enforces Section 13k against "expressive con-

---

[7] The Court has suggested that a different principle may apply when the vagueness of the challenged statute substantially deters the exercise of First Amendment rights. Compare *Young* v. *American Mini Theatres, supra*, 427 U.S. at 59-61, with *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). To the extent appellees make such a contention, their vagueness argument appears to merge with their overbreadth claim, which we address at pages 12-14, *infra*.

duct, including carrying a sign, passing out leaflets or participating in a demonstration" (Mot. to Aff. App. 38a). Appellees explicity acknowledge that "[t]he longstanding practice of the Marshal is to enforce § 13k against all expressive activities" (Br. 14). A person wearing or carrying an object with words on it while present on the Court grounds for another purpose is not engaged in expressive conduct that threatens the interests protected by Section 13k; nor is an inanimate newspaper machine (Appellees' Br. 24, 36) or the person who placed it there (Appellees' Br. 25) engaged in expressive conduct. Such a consistent administrative interpretation, especially when it reflects "custom and usage" (*Parker* v. *Levy*, *supra*, 417 U.S. at 754), can remove any arguable vagueness from a statute. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, *supra*, slip op. 14; *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 110.[8]

Appellees and amici also assert that Section 13k is overbroad. But unless a statute deters "a substantial amount of constitutionally protected conduct * * * [an] overbreadth challenge must fail." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, *supra*, slip op. 4-5 (footnote omitted). "[P]articularly where conduct and not merely speech is involved, * * * the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Some of the allegedly

---

[8] Appellees' discussion reflects little difficulty distinguishing between expressive activity and other activity that, they assert, falls within the terms of Section 13k. See, *e.g.*, Appellees' Br. 6 n.6 (asserting that an attempt to seek a permit would be futile because no expressive activity is permitted on Court grounds), 7, 9, 14.

overbroad applications that appellees hypothesize—such as groups of tourists posing for pictures on the steps of the Court (Br. 38)—are in fact not within the proscription of Section 13k, which, as interpreted by the Marshal, applies only to "processions or assemblages * * * designed or adapted to bring into public notice a[] party, organization, or movement." And there is no reason to believe that any person—let alone a substantial number of persons—has been deterred by Section 13k from such activities as wearing a T-shirt with a message while incidentally walking across the Court grounds. Since it is the Marshal's practice to warn any person before arresting him for violating Section 13k (Mot. to Aff. App. 38a), anyone who is in doubt may seek guidance at no risk. Moreover, it is unlikely that deterring any person from such an action would affect his *First Amendment* rights; very likely, a person who is not engaging in a public demonstration will choose his attire out of convenience (see page 11 note 7, *supra*), and an overbreadth claim can be made only if First Amendment rights are threatened.

In any event, even if Section 13k were overbroad, the proper remedy—contrary to the court of appeals—would not be to invalidate it on its face:

> When a federal court is dealing with a federal statute challenged as overboard, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. * * * Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated.

New York v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 22 n.24; see, *e.g.*, *United States* v. *Thirty-Seven*

Photographs, 402 U.S. 363, 367-375 (1971); *id.* at 375 n.3 (plurality opinion).

Finally, appellees urge that their hypothetical examples show that Section 13k does not effectively limit the discretion of those charged with enforcing it. As we recognized in our opening brief (Br. 29, 30), Section 13k, like all statutes, leaves some room for discretionary action. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 110 (footnote omitted). The Marshal has interpreted Section 13k to permit certain everyday activities that it was obviously not intended to proscribe but that a highly creative reading of its terms might reach. But as we have explained (Appellants' Br. 28-31; page 7, *supra*) this is a far narrower range of discretion than 18 U.S.C. 1507 permits. We also note that there is no suggestion that Section 13k is enforced in a fashion that discriminates on the basis of the content of expression.[9]

---

[9] We addressed the question of disqualification in the Jurisdictional Statement (J.S. 14-15), where we pointed out that in view of the strong public policy requiring this Court to review decisions invalidating Acts of Congress, any doubts should be resolved against disqualification. We adhere to that position. We would add, in view of that policy and of the fact that Section 13k was declared unconstitutional by a panel of the court of appeals that divided 2-1—and therefore, in effect, by the vote of a single judge—that this Court appears to have the power to remand the case to the court of appeals for further consideration of the government's request for rehearing en banc, should the Court believe that there may not be a quorum of qualified Justices. Compare 28 U.S.C. 2106 with 28 U.S.C. 2109.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 395998 1251

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

MARY T. GRACE, ET AL.,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, AMICI CURIAE

A. STEPHEN HUT, JR.
Counsel of Record
CRAIG J. BLAKELEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Amici Curiae

Of Counsel:

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

November 15, 1982

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
40 U.S.C. § 13k IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT	5
A. Section 13k Impermissibly Restricts the Exercise of First Amendment Rights by Prohibiting All Demonstrative Speech and Conduct on the Supreme Court Grounds	6
B. Section 13k Is Not Narrowly Drawn To Promote Compelling Governmental Interests	12
1. Section 13k Cannot Be Justified by the Government's Interest in Regulating Public Property	13
2. Section 13k Is Not Narrowly Drawn To Protect the Government's Interest in the Impartial Administration of Justice	14
3. Section 13k Cannot Be Justified on the Basis of Any Other Governmental Interest	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) 2

A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975) 7, 10, 11, 21

Adderley v. Florida, 385 U.S. 39 (1966) 11, 13

Bates v. City of Little Rock, 361 U.S. 516 (1960) .. 5

Brandenburg v. Ohio, 395 U.S. 444 (1969) 2

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) .. 5, 6

Carey v. Brown, 447 U.S. 455 (1980) 21

Carrington v. Rash, 380 U.S. 89 (1965) 17

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 14

Cohen v. California, 403 U.S. 15 (1971) 7

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 17

Cox v. New Hampshire, 312 U.S. 569 (1941) 12, 13

Cox v. Louisiana, 379 U.S. 559 (1965) 4, 5, 9, 10, 16, 21

Dellums v. Powell, 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) 2

Eisenstadt v. Baird, 405 U.S. 438 (1972) 19

Elrod v. Burns, 427 U.S. 347 (1976) 5, 6

First National Bank v. Bellotti, 435 U.S. 765 (1978) 5

Flower v. United States, 407 U.S. 197 (1972) (per curiam) 14

Grace v. Burger, 665 F.2d 1193 (D.C. Cir. 1981) .. 1, 3, 7, 14, 20

Grayned v. City of Rockford, 408 U.S. 104 (1972) .. 12

Greer v. Spock, 424 U.S. 828 (1976) 12, 13, 14

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 2, 9, 12

Jeannette Rankin Brigade v. Chief of the Capitol Police, 342 F. Supp. 575 (D.D.C.) (3-judge court), *aff'd mem.*, 409 U.S. 972 (1972) 2, 7, 10, 20, 21

Johnson v. Robison, 415 U.S. 361 (1974) 19

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 13

Kovacs v. Cooper, 336 U.S. 77 (1949) 8, 12

Kusper v. Pontikes, 414 U.S. 51 (1973) 6

TABLE OF AUTHORITIES—Continued

Page

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 5, 6, 7, 11
Martin v. City of Struthers, 319 U.S. 141 (1943) 8
NAACP v. Button, 371 U.S. 415 (1963) 5
NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122 (U.S. July 2, 1982) 15
New York v. Ferber, 50 U.S.L.W. 5077 (U.S. July 2, 1982) 17
Oyama v. California, 332 U.S. 633 (1948) 17
Saffron v. Wilson, 481 F. Supp. 228 (D.D.C. 1979), *aff'd mem.*, No. 79-2236 (D.C. Cir. Dec. 9, 1980) 2
Schlesinger v. Ballard, 419 U.S. 498 (1975) 19
Schneider v. State, 308 U.S. 147 (1939) 11
Shelton v. Tucker, 364 U.S. 479 (1960) 6
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 2
United States v. O'Brien, 391 U.S. 367 (1968) 8
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 17

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS:

U.S. Const. amend. I ..... *passim*
18 U.S.C. § 1507 (1976) 4, 16, 17, 19, 21
40 U.S.C. § 13j (1976) 18
40 U.S.C. § 13k (1976) ..... *passim*
40 U.S.C. § 13*l* (1976) 18
40 U.S.C. § 193g (1976) 20
36 C.F.R. § 50.19 (1981), *as amended by* 46 Fed. Reg. 55,959 (1981), 47 Fed. Reg. 24,299 (1982) 18

LEGISLATIVE MATERIALS:

95 Cong. Rec. 8962 (1949) 19
H.R. Rep. No. 814, 81st Cong., 1st Sess. (1949) 20
H.R. Rep. No. 1281, 81st Cong., 1st Sess. (1949) 16
S. Rep. No. 719, 81st Cong., 1st Sess. (1949) 20

MISCELLANEOUS:

Traffic and Motor Vehicle Regulations for the United States Capitol Grounds (April 12, 1976) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1863

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

MARY T. GRACE, ET AL.,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, AMICI CURIAE

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) and the American Civil Liberties Union Fund of the National Capital Area (ACLU Fund), with the consent of the parties, jointly file this brief in support of appellees.[1] We urge this Court to affirm the judgment of the court below, *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981), holding that 40 U.S.C. § 13k (1976) is unconstitutional under the First Amendment.

The ACLU is a nationwide, non-partisan, non-profit membership organization of over 250,000 members which

---

[1] Written consents by all parties to the filing of this Brief have been lodged with the Clerk of the Court.

for more than 60 years has been dedicated to the protection of personal liberty through a vigorous defense of the fundamental principles embodied in the Bill of Rights, especially the First Amendment. The ACLU Fund is the litigation arm of the ACLU in the Washington, D.C. area. Both the ACLU and the ACLU Fund have appeared frequently in the federal courts as counsel for parties and as amicus in First Amendment cases involving freedom of expression and association. For example, the ACLU appeared before this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

The ACLU Fund has been particularly active in establishing and protecting the free speech rights of demonstrators near government buildings in Washington, D.C. The Fund has successfully argued in support of those seeking to exercise their First Amendment rights on the grounds of the Capitol, *see Dellums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), and *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (3-judge court), *aff'd mem.*, 409 U.S. 972 (1972), as well as at the White House, *see A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969), and *Saffron v. Wilson*, 481 F. Supp. 228 (D.D.C. 1979), *aff'd mem.*, No. 79-2236 (D.C. Cir. Dec. 9, 1980).

This case involves a statute virtually identical to the one held unconstitutional in *Jeannette Rankin Brigade v. Chief of the Capitol Police, supra.* The statute absolutely prohibits certain speech and expressive conduct anywhere on the Supreme Court grounds. The importance of this case rests in substantial part on this Court's role as one of the three co-equal branches of our national government. Similarly broad prohibitions of expression have been held unconstitutional with respect to the Capitol and the

White House. Amici believe that the First Amendment applies with equal force here and that its protections do not stop at the curb of the Supreme Court sidewalk. In light of this Court's central role in protecting the constitutional rights of our nation's citizens, including freedom of expression, it would be ironic indeed if such an absolute prohibition were to be upheld with respect to the Supreme Court grounds. Accordingly, this Brief is submitted in support of the position of appellees.

SUMMARY OF ARGUMENT

This case presents the question whether 40 U.S.C. § 13k, which absolutely prohibits a wide variety of expressive activity on the grounds of the Supreme Court, is unconstitutional under the First Amendment. The case comes to this Court from a decision of the United States Court of Appeals for the District of Columbia Circuit that held the statute unconstitutional. *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981). We believe that, under the First Amendment analysis consistently applied by this Court, the decision of the Court of Appeals was correct and its judgment should be affirmed.[2]

Section 13k is not, as the Government argues, a mere restriction of the time, place, or manner of expression. The statute prohibits any parading, standing, or moving in processions or assemblages as well as the display of "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Expression falling within the disfavored classification is not merely regulated but is absolutely prohibited at any time or in any manner anywhere on the Supreme Court grounds. This restriction represents a substantial intrusion upon protected First Amendment rights. In forcing leafleters and demonstrators to use sites other than the

---

[2] Like the court below, we do not suggest that any individual may picket or leaflet in the Supreme Court building itself. *Grace v. Burger*, 665 F.2d at 1205. Because the statute broadly prohibits expression throughout the Court's grounds (and not only in the Supreme Court building), it clearly is unconstitutionally overbroad.

Court grounds, section 13k significantly reduces their ability to convey their message to their intended audience.

Congress does not have unfettered discretion to prohibit expression on the grounds of the Supreme Court or any other public property. Such restrictions must be justified on the basis of compelling governmental interests and must be no broader than necessary to serve those interests. The prohibition of section 13k sweeps far too broadly to pass constitutional muster. Although the Government argues that the statutory ban is required in order to prevent expressive activity from influencing, or appearing to influence, this Court in the administration of justice, section 13k extends far beyond what is necessary to accomplish that goal. It proscribes expression, including actions of a single leafleter or demonstrator, that even the Government concedes "will usually not create an actual danger of real or perceived intimidation of the judiciary." Gov't. Br. 25 n.9. Although the Government continues to argue that section 13k is less restrictive than other alternative approaches, the Government's position stands traditional First Amendment analysis on its head. In fact, there are a number of less restrictive alternatives available that fully protect the Government's interest, including an existing criminal statute, 18 U.S.C. § 1507 (1976), which is virtually identical to the statute this Court upheld in *Cox v. Louisiana*, 379 U.S. 559 (1965).

Nor is section 13k justified by the Government's purported interest in preserving the symbolic value of the grounds of this Court. Similar restrictions have been struck down with respect to the Capitol and White House grounds, and nothing in the legislative history of section 13k indicates that Congress believed that the grounds of this Court uniquely require such a complete ban on expression. But even if Congress did intend thereby to protect symbolic values, that purpose is insufficient to justify the broad restrictions on First Amendment rights imposed by section 13k.

ARGUMENT

40 U.S.C. § 13k IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

This Court's decision in *Cox v. Louisiana*, 379 U.S. 559 (1965) (*Cox II*), makes clear that section 13k is unconstitutional.[3] In *Cox II* the Court upheld a Louisiana statute that prohibited picketing or parading near a courthouse with the intent of interfering with or otherwise influencing any judge or court officer in the administration of justice. Unlike section 13k, the statute at issue in *Cox II* was not a broad prohibition of all demonstrative conduct but a narrowly drawn regulation designed to prevent a specific harm. In upholding the statute, this Court recognized the state's compelling interest in protecting the "judicial process" by preserving the actual and apparent impartiality of its judiciary. 379 U.S. at 562. But the Court cautioned that the state's interest, although substantial, was narrow and would not support a broad prohibition of expressive conduct. *Id.* at 567.

As *Cox II* and other decisions by this Court make clear, governmental restrictions on speech and expressive conduct will be sustained only if they are narrowly drawn to serve a compelling governmental interest.[4] *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *Bates v. City of Little*

---

[3] 40 U.S.C. § 13k provides:

> "It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement."

[4] "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). *See Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

Rock, 361 U.S. 516, 524 (1960). Thus, a restriction on speech or expressive conduct cannot survive if there are alternatives that are less restrictive of speech and expression and that serve the same purposes.[5] *Kusper v. Pontikes*, 414 U.S. at 59; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). And it is the Government that bears the burden of demonstrating that its interest cannot be protected adequately by more limited regulation of expression.[6] *Buckley v. Valeo*, 424 U.S. at 25; *Elrod v. Burns*, 427 U.S. at 362. As we demonstrate below, the Government has failed to carry its burden.

A. Section 13k Significantly Restricts the Exercise of First Amendment Rights by Prohibiting All Demonstrative Speech and Conduct on the Supreme Court Grounds.

Statutes that prohibit speech altogether "stand on a different footing" from statutes that merely regulate the time, place, or manner of speech. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 93. Section 13k is an absolute prohibition; it bars all demonstrative speech or conduct on the Supreme Court grounds and imposes substantial burdens on anyone seeking to communicate with those who visit or transact business in this Court.[7] The Government argues that those burdens

---

[5] "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."

Kusper v. Pontikes, 414 U.S. 51, 59 (1973) (citations omitted).

[6] Nor do these principles vary if the restriction is limited to governmental property. *See* pp. 13-14 *infra*.

[7] The Government characterizes the statute as prohibiting only public demonstrations, picketing and leafleting. *See* Gov't. Br. 13. But the statute in fact is considerably broader in its reach. It prohibits the "display [of] any flag, banner, or device designed or

are "minimal" (Gov't. Br. 13), because there exist alternative forums for such expression—for example, the area across the street from the Court—and that section 13k is, for this reason, merely a permissible regulation of time, place, and manner. This argument misses the mark, however, because no alternative mode or place of communication is available that would permit appellees and others reasonably and effectively to reach their intended audience.[8]

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 93, this Court identified the factors that determine whether there exist reasonable alternatives for speech and expression sufficient to sustain an asserted restriction of time, place or manner. Such an alternative, first, must be as effective in conveying the speaker's intended message. *Cf. Cohen v. California*, 403 U.S. 15, 25-26 (1971). Moreover, the alternative must permit the

---

adapted to bring into public notice any party, organization, or movement." 40 U.S.C. § 13k. During the proceedings before the Court of Appeals the Government's counsel admitted that the statute appears to prohibit, among other things, the wearing of a lapel button displaying a miniature flag of the United States. *Grace v. Burger*, 665 F.2d at 1194 n.2. *Compare Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. at 586 n.13.

[8] The Government's approach would convert any restriction of speech into a mere regulation of time, place, or manner. Even a complete prohibition of expression in Washington, D.C. for example, could be characterized as a restriction of time, place, or manner if the relevant "place" were the eastern United States. The distinction lies in the purpose to be served by the speech and, whether, in light of that purpose, the alternatives are reasonable by virtue of being functionally interchangeable with the time, place or manner that is prohibited. *See Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. at 93 (and cases cited therein). Here, because of the unique importance of the Court and the other reasons discussed below (pp. 8-11 *infra*), it is clear that there is no effective substitute for demonstrative conduct on the grounds of this Court. *See A Quaker Action Group v. Morton*, 516 F.2d 717, 733 & n.49a (D.C. Cir. 1975); *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 342 F. Supp. at 583-85. Section 13k thus operates as an absolute prohibition of expression.

speaker to reach the intended audience as readily. *Cf. United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring). Finally, restricting the speaker to the alternative site or method of communication must not significantly increase the burdens on the exercise of First Amendment rights. *Cf. Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943); *Kovacs v. Cooper*, 336 U.S. 77, 102-03 (1949) (Black, J., dissenting).

Applying these factors, it is clear that the opportunity to picket or leaflet across the street from the Court is insufficient to ameliorate the substantial burden that section 13k imposes on protected speech. Section 13k significantly reduces the likelihood that speakers and other demonstrators will be able readily to convey their message to their intended audience, and it thus imposes an impermissible burden upon the exercise of their First Amendment rights. To be sure, demonstrators positioned across the street from the Court could be seen by some of those entering and leaving the Supreme Court grounds.[9] But mere knowledge of the *presence* of demonstrators does not assure knowledge of the *reason for their presence*. Such knowledge may completely escape observers on the Supreme Court grounds. Not only will speakers stationed across the street be able to communicate with fewer people, but it is undoubtedly more difficult and more costly to design signs or placards large enough to communicate the message to distant onlookers.

More significantly, the absence of oral communication or the opportunity to hand a leaflet or brochure to a passerby often will seriously impede the opportunity to convey the intended message. Indeed, there is no assurance that those who are present on the grounds of the Court will even be aware that the message from across the street is

[9] Apparently, this is what the Government intends by its assertion that, had appellees chosen to exercise their First Amendment rights across the street from the Court, "few . . . would have mistaken their point." Gov't. Br. 15.

directed at them. Unlike the fairground booths that the Court found to be an acceptable time, place, and manner restriction in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the alternative site that the Government offers here is separate from and not contained within the Supreme Court grounds. It is not an area "where visitors [to the Supreme Court] are expected and indeed encouraged to pass." *Id.* at 655 n.16.

The Government's analysis is unpersuasive because it simply ignores the reasons why the ability to communicate directly and effectively with those who visit the Court may be crucial. Contrary to the Government's arguments, speakers whose message is unrelated to the case-deciding function of this Court do *not* have "far less of an interest" in being on Court grounds. Gov't. Br. 14. As the "apex of our judicial system," (Gov't. Br. 38 n.16), this Court serves as a focal point for the activities of a unique group of people: parties and their counsel; news media; and lawyers, tourists, and others who visit the Court. This is a largely self-selected target audience, with whom a wide variety of speakers may wish to communicate about particular issues likely to be of interest to them. For example, appellee Mary Grace, a lone picketer, carried a sign containing the words of the First Amendment. It is reasonable to suppose that those who visit this Court constitute an audience that is particularly conversant with the language and spirit of the First Amendment and therefore receptive to the intended message.[10] Burdens on access to this audience are hardly "minimal."

---

[10] The Government also asserts that, because the Court deals with a broad range of important public issues and because those with a message *wholly unrelated* to the Court's functions are not likely to demonstrate at the Court, section 13k does not have a significant impact on protected speech. Gov't. Br. 27-29. The implication of the Government's argument, that *Cox II* allows an absolute prohibition of any speech on courthouse grounds that is *at all* related to the functioning of a particular court or to the judiciary in general, is false. *Cox II* upheld only a narrow restriction of expression intended

Indeed, the ability to reach this audience is of no less practical or constitutional importance than the ability to reach non-judicial officers in a state courthouse was in *Cox II*. *Cox II* makes clear that expressive activity near a courthouse may be directed at listeners other than judges and that such conduct is entitled to a high degree of constitutional protection. The Court emphasized that

> "entirely different considerations would apply if, for example, the demonstrators were picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building." [11]

379 U.S. at 567.

---

to prevent actual or apparent interference with any "judicial proceedings." 379 U.S. at 567.

In fact, there are other speakers with other messages unrelated to the Court's case-deciding function for whom persons on the grounds of this Court would be a particularly appropriate audience. For example, those advocating increases—or decreases—in federal appropriations for legal services for the poor might well specially value the opportunity to advocate these positions on Supreme Court grounds. So too might speakers urging positions respecting pending proposals to restrict the jurisdiction of federal courts, speakers urging the establishment of a National Court of Appeals (or similar entity) to reduce the Supreme Court's workload, or speakers (like appellee Thaddeus Zywicki here) expressing views on the number and qualifications of judges in the lower federal courts. While not directed at the members of this Court, its case-deciding function, or "judicial proceedings," such speech constitutes protected petitioning activity for which the grounds of this Court would be a particularly appropriate location. *Compare A Quaker Action Group v. Morton, supra*; *Jeannette Rankin Brigade v. Chief of the Capitol Police, supra*.

[11] Although the Government argues that the Court in *Cox II* was concerned *only* with the possible presence of nonjudicial officers (Gov't. Br. 10-11, 27), it is clear that the Court was speaking only by way of example and, in fact, was equally concerned with the possible presence of other potential listeners so long as the message was not intended, and would not appear, to affect "judicial proceedings."

Not only does the Government overlook the unique composition of the audience that might be reached on the grounds of the Court, but it also ignores the symbolic importance of this Court that renders it a unique place for the exercise of First Amendment rights. The federal judiciary is one of the three co-equal branches of our national government, and this Court has a singularly important role as the symbol of our Constitution, the rights and liberties protected by it, and our national devotion to the rule of law.

Commensurate with its special position in our national life, the Court possesses a unique character which renders it peculiarly suitable as a backdrop for certain expressive activity, particularly petitioning. As the United States Court of Appeals for the District of Columbia Circuit noted in rejecting the Government's argument that the Ellipse constituted a suitable alternative for those who wished to demonstrate at the White House, "[W]e cannot ignore the unique quality of demonstrations in front of the White House from the viewpoint of First Amendment interests." *A Quaker Action Group v. Morton*, 516 F.2d at 733 n.49a. The fact that protected demonstrative conduct would not be directed at this Court or its members does not make the Supreme Court any less unique or appropriate as the backdrop for expression. Thus, "[t]he alternatives . . . are far from satisfactory." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 93. Since "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schneider v. State*, 308 U.S. 147, 163 (1939), section 13k must fairly be read for what it purports to be—an absolute ban on demonstrative speech and conduct.[12]

---

[12] As such, section 13k differs from the restrictions at issue in the cases on which the Government principally relies. *See* Govt. Br. 15-16. Section 13k does not merely restrict the use of some part of the Court's grounds, as did the restriction in *Adderley v. Florida*,

B. Section 13k Is Not Narrowly Drawn To Promote Compelling Governmental Interests.

In order to sustain section 13k's absolute ban on speech, the Government must bear the heavy burden of demonstrating that section 13k is narrowly drawn to advance some compelling governmental purpose. *See, e.g., Grayned v. City of Rockford*, 408 U.S. at 116-17. *See Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J. concurring). The Government has pointed to several interests that it asserts support the statute, but neither the Government's interest in the regulation of its own property nor its concededly substantial concern with the impartial administration of justice is sufficient to justify section 13k's unnecessarily broad prohibition of expression. And, there are a variety of less restrictive alternatives available that would amply serve to protect the Court against interference with its decisional process. Moreover, the Government's stated concern that any public expression of views

---

385 U.S. 39 (1966), or regulate the time during which demonstrative conduct may occur as did the licensing requirement upheld in *Cox v. New Hampshire*, 312 U.S. 569 (1941). Nor does it simply prohibit noisy demonstrations, *see Grayned v. City of Rockford*, 408 U.S. 104 (1972), or the level of permitted sound amplification, *see Kovacs v. Cooper*, 336 U.S. 77 (1949). And unlike the rule in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), which required those soliciting contributions to do so in booths on the fairgrounds, section 13k does not allow demonstrative conduct anywhere on the grounds of the Court.

Moreover, the statute is not applied in a content-neutral fashion and thus could not, in any case, qualify as a valid time, place, or manner restriction. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. at 648. Contrary to the Government's assertion (Gov't. Br. 7), appellees have indeed made a showing that section 13k is discriminatorily enforced. *See, e.g.*, Appellees' Motion to Affirm at 9-10. The District Court and the Court of Appeals disposed of the case on other grounds and therefore had no occasion to address that issue. We note, however, that the clear evidence of selective enforcement presented in the proceedings below serves to demonstrate further the statute's underinclusiveness. *See* pp. 20-21 *infra*.

on the grounds of this Court may somehow compromise the Court as a symbol of calm solemnity and impartiality is a mere afterthought, which finds no support in the legislative history.

1. *Section 13k Cannot Be Justified by the Government's Interest in Regulating Public Property.*

The Court should first reject the contention (Gov't. Br. 17-21, 35) that the Government's burden of justification is sharply reduced where Congress seeks only to regulate or prohibit expression on public property. The fact that governmental property is involved is not dispositive, and conclusory labels—whether particular property is or is not a "public forum"—do not provide any additional justification for restrictions on speech above and beyond the underlying purpose of the statute.

In particular, the Government's attempt to equate its power to prohibit expression on the grounds of this Court with its power to regulate speech in the restricted environment of a jail or military base (Gov't. Br. 20-21) is clearly wrong. The degree to which restrictions on speech on public property are permissible is closely related to the Government's need generally to restrict public access to the property. Thus, streets and parks normally are open to the public, and the Government's need to restrict speech and expression in places where members of the public routinely are found is not great. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). By contrast, members of the public do not have free and unimpeded access to jails or military bases. Consistent with such restrictions—and the need to maintain order and discipline—speech in jails and military bases can be significantly restricted. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (jail); *Adderley v. Florida*, 385 U.S. 39 (1966) (jail); *Greer v. Spock*, 424 U.S. 828 (1976) (military base).

We do not understand the Government to suggest that, in general, public access to the Supreme Court

grounds is (or should be) significantly limited, as access is (and often must be) to a jail or military base. To the contrary, access to the grounds of the Court generally is not restricted at all—a public sidewalk runs the full perimeter of the Court's grounds. Although the absence of restrictions on public access may not automatically convert public property into a "public forum," *see Greer v. Spock*, 424 U.S. at 836, so also the absence of restricted access is fatal to the Government's assertion that it may prohibit expression without showing a substantial justification for the prohibition, *see Flower v. United States*, 407 U.S. 197 (1972) (per curiam). The Court of Appeals correctly identified the controlling legal principle:

> "[W]henever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest--whether the interest derives from the very nature of the property itself, or from some other source."

Grace v. Burger, 665 F.2d at 1202. Here, the Government has failed to provide such justification.

2. *Section 13k Is Not Narrowly Drawn To Protect the Government's Interest in the Impartial Administration of Justice.*

Although it is common ground that the Government has a substantial interest in protecting against actual or apparent interference in the administration of justice, the Constitution requires that the means used to promote such an interest be narrowly drawn to avoid the abridgment of First Amendment rights. As this Court cautioned in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968):

> "in the area of First Amendment rights [a statute] must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of

> the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

See also NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122, 5131 (U.S. July 2, 1982).

Section 13k is clearly overbroad. The statute is not narrowly drawn, and it goes much further than is necessary to safeguard the Government's interest in protecting this Court against interference with the administration of justice. Indeed, the Government concedes in its Brief that section 13k prohibits a broad range of protected activity that could not have any adverse impact on that interest:

> "We recognize, of course, that a single leafleter or demonstrator—or, for that matter, most small crowds or a well-behaved large crowd—will usually not create an actual danger of real or perceived intimidation of the judiciary." [13]

Gov't. Br. 25 n.9. Thus, a single leafleter or demonstrator, three or four leafleters or demonstrators stationed at various points on the perimeter of the Court's grounds, or even a somewhat larger group of well-behaved demonstrators presents no possibility of harming the Government's interest. Section 13k, however, impermissibly prohibits each of these without distinction.

The existence of other less restrictive alternatives, apparently intended to accomplish the same goal, serves further to demonstrate that section 13k is not sufficiently narrowly drawn. Indeed, it is apparent that Congress intended to, and did, accomplish the very purpose now advanced by the Government in support of section 13k through

---

[13] Thus, the Government appears to concede that, at a minimum, the statute was not constitutionally applied to the actions of appellees (Govt. Br. 25 n.9)—both of whom were individual leafleters.

its enactment of 18 U.S.C. § 1507.[14] As the legislative history indicates, section 1507 represents a considered determination by the Congress that the need to preserve the real and apparent impartiality of the federal judiciary, including this Court, does not, in the face of important First Amendment interests, require a complete ban on demonstrative activity.

Section 1507 is virtually identical to the Louisiana statute that was upheld in *Cox II*; it prohibits picketing or parading near a United States courthouse with the intent of influencing any judge or other court officer in the discharge of his duty or otherwise interfering with the administration of justice. Unlike the legislative history of section 13k, which evidences no consideration of the statute's constitutional implications, the legislative history of section 1507 reflects a full awareness of and accommodation of the important First Amendment rights involved. Thus, the Congress gave "[s]erious consideration . . . to the possibility that this legislation [§1507] would interfere with the fundamental rights of picketing and free speech." H.R. Rep. No. 1281, 81st Cong., 1st Sess. 3 (1949). Nevertheless, the Congress concluded that because the "statute does not interfere with those rights to such an extent as to render it unconstitutional . . . this bill is a proper and constitutional restriction on the right of picketing." *Id.* Accordingly, section 1507 is limited in scope and "denounces as a crime only that picketing, parading, or causing noises which interferes with the administration of justice." *Id.*

---

[14] The Government's suggestion that section 1507 prohibits only the actions of demonstrators as to whom there is direct proof that they subjectively *intend* to influence the Court, but not the actions of those who may be *seen* as influencing the Court (Gov't. Br. 28), is baseless. As this Court noted in *Cox II*, the intent necessary to establish a violation of section 1507 may be inferred from evidence of any activity that reasonably may be seen as influencing the Court. *Cox II*, 379 U.S. at 567. Thus, section 1507 fully protects the Government's interest.

The Government's argument that section 13k is less restrictive of First Amendment rights than section 1507 is frivolous. Section 1507 may, as the Government suggests, require courts to examine the content of speech for certain purposes. But such examination is not unknown to the courts, which often must look to the content of expression when they are asked to determine whether a particular kind of speech is covered by the First Amendment.[15] *E.g., Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 538 n.5 (1980) (and cases cited therein). The analysis mandated by the intent requirement of section 1507 is in substance no different.

Of course, the judicial examination of content is a matter of great constitutional delicacy. But the Government's proposed cure is worse than the disease, since the Government's suggestion is that in order to avoid the risk inherent in prohibiting some speech, *all* speech should be banned. Gov't. Br. 28-31 & n.12. Although an absolute ban would reduce the administrative burden on courts and other officials, this Court has consistently held that fundamental rights may not be restricted merely for purposes of administrative convenience. *E.g., Oyama v. California*, 332 U.S. 633 (1948); *see Carrington v. Rash*, 380 U.S. 89, 96 (1965).

Even if section 1507 were not fully adequate to meet the Government's legitimate purposes, there are other less restrictive alternatives available that remove any need to resort to the absolute ban of section 13k. The size or manner of demonstrative conduct could be restricted or a limitation placed on the number of in-

---

[15] For example, obscene material is distinguished from non-obscene on the basis of content, *e.g., New York v. Ferber*, 50 U.S.L.W. 5077, 5082 (U.S. July 2, 1982) and "the content of the utterance . . . determines whether it is a protected epithet or an unprotected 'fighting comment.'" *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976).

dividuals who would be allowed to engage simultaneously in such activity. In fact, many such restrictions now exist. For instance, 40 U.S.C. § 13j prohibits the making of any "harangue or oration" or using any "loud, threatening, or abusive language" in the Supreme Court building or on its grounds. Moreover, 40 U.S.C. § 13*l* empowers the Marshal to prescribe such regulations "as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds." [16] Given the existence of these less restrictive alternatives that fully meet the Government's legitimate interests, section 13k must give way to the protections of the First Amendment.

3. *Section 13k Cannot Be Justified on the Basis of Any Other Asserted Government Interest.*

In addition to its interest in preventing actual or apparent interference in the judicial process, the Government argues that the broad prohibition of section 13k is necessary in order to protect the symbolic importance of the grounds of this Court. Gov't. Br. 36-39. But the Government has not succeeded in demonstrating that section 13k was intended to do anything other than extend to the grounds of this Court the same restrictions that (at the time of its passage) already applied to the Capitol grounds. Thus, the rationale said to underlie section 13k—that Congress dedicated the Supreme Court

---

[16] Of course, there would be nothing to prevent the Court from regulating expressive activity on its grounds pursuant to genuinely reasonable restrictions of time, place, or manner. There are now regulations that apply to both the White House and the Capitol. *See* 36 C.F.R. § 50.19 (1981), *as amended by* 46 Fed. Reg. 55,959 (1981), 47 Fed. Reg. 24,299 (1982) (White House); Traffic and Motor Vehicle Regulations for the United States Capitol Grounds (April 12, 1976) (Capitol).

grounds "as a symbol of the 'calmness and solemnity of the courtroom' . . . and the independence of the judicial branch from political pressure" (Gov't. Br. 37)—is merely a *post hoc* justification manufactured by Government counsel, and it should be given no weight by this Court.[17]

The meager legislative history of section 13k supplies no support for this claimed purpose. Nor is there any indication that, as the Government asserts, Congress determined that public demonstrations are "'basically incompatible with' these symbolic purposes."[18] Gov't. Br. 37. As Representative Emmanuel Celler, then Chairman of the House Judiciary Committee, stated on the floor of the House of Representatives: "[A]ll this bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself—no more and no less." 95 Cong. Rec. 8962 (1949). The Committee Report similarly states "that in keeping with the dignity of the highest Court in the land, provision should be made for the policing of its building and grounds *similar to that which is made*

---

[17] On previous occasions this Court has examined governmental interests asserted before it to determine whether they were in fact the legislative purpose. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 442-43 (1972). Moreover, where, as here, the legislative history clearly sets forth the legislative purpose, the Court has declined to look beyond that. *See Johnson v. Robison*, 415 U.S. 361, 376 (1974). *See also Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting).

[18] The Government also argues that Congress "chose to reduce discretionary enforcement [of 18 U.S.C. § 1507] by legislating, for the Supreme Court grounds, the more 'explicit standards' of Section 13k." Gov't. Br. 30. This argument derives no support from the legislative history and is merely another of the Government's speculative attempts to imagine some purpose for section 13k, no matter how implausible. Indeed, since section 1507 was enacted in 1950, one year after the enactment of section 13k, this argument is demonstrably incorrect.

for the United States Capitol." H.R. Rep. No. 814, 81st Cong., 1st Sess. 2 (1949) (emphasis added). *See* S. Rep. No. 719, 81st Cong., 1st Sess. (1949). Contrary to the Government's contention that Congress determined to treat the Supreme Court grounds differently from the grounds of the Capitol or the White House (Gov't. Br. 36-38), it is clear that Congress believed that the Court should be treated in this respect precisely the same as the other two branches of the government. The legislative history "demonstrates no particularized congressional concerns with either the fair administration of justice or public confidence in the judicial process." *Grace v. Burger*, 665 F.2d at 1203.

In any case, section 13k does not enhance or protect symbolic values to any significant degree. As the Government has repeatedly noted throughout its brief (Gov't. Br. 8, 10, 14, 15), section 13k leaves individuals free to leaflet and picket across the street from the Court. Such demonstrations are clearly visible from the Court grounds. *Id.* at 15. Thus, to the extent symbolic values are compromised at all, such demonstrations have no less of an effect than demonstrations on the grounds of the Court. This strongly suggests that Congress itself never viewed section 13k as furthering the symbolic interests that the Government now argues are so compelling.[19] The statute's patent underinclusiveness in relation to its asserted purpose confirms that Congress did not enact section 13k in order to serve the symbolic values as a "transcendent ob-

[19] It is true that, at the time section 13k originally was enacted, 40 U.S.C. § 193g prohibited all demonstrative conduct on the Capitol grounds, including across the street from the Supreme Court. But that statute was held to be unconstitutional in *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.) (3-judge court), *aff'd mem.*, 409 U.S. 972 (1972). In the ten years intervening between that decision and the present, Congress has failed to extend the scope of section 13k beyond the curb adjacent to the Court's grounds.

jective," *Carey v. Brown*, 447 U.S. 455, 465 (1980), requiring an absolute ban of expressive activity. *See id.*

Even if Congress had elected to dedicate the Supreme Court grounds to these symbolic values—which it did not—the courts have found similar objectives insufficiently compelling to justify similarly broad restrictions on expressive conduct on the grounds of the Capitol and the White House. In *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (a decision affirmed by this Court, 409 U.S. 972 (1972)) the court struck down a statute virtually identical to section 13k, finding that it was not justified by the Government's purported interests in maintaining "a park-like setting" and in the "glorification of a form of government through visual enhancement of its public buildings." 342 F. Supp. at 585. And in *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975), the court held that, in light of the unique importance of the White House for First Amendment purposes, the Government's interest in the security of the President and the White House was not sufficiently compelling to justify an unreasonable limitation on the number of people who could demonstrate in Lafayette Park or on the sidewalk in front of the White House. Thus, the absolute prohibition of expression imposed by section 13k cannot be justified by any asserted interest in maintaining the dignity and decorum of this Court.[20] Accordingly, section 13k is unconstitutionally overbroad.

---

[20] The Government argues that demonstrations near the Capitol or the White House grounds may be constitutionally protected even though those near a courthouse are not. Gov't. Br. 37 n.15. The difference, says the Government, is that courts, unlike the legislative or executive branches, should be immune to "political pressure." Gov't. Br. 37. But as this Court held in *Cox II*, the Government's interest in restricting speech that is intended to exert such pressure justifies only a narrow restriction of expression, and section 1507 fully protects that interest.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals and hold 40 U.S.C. § 13k unconstitutional under the First Amendment.

Respectfully submitted,

A. STEPHEN HUT, JR.
Counsel of Record
CRAIG J. BLAKELEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Amici Curiae

Of Counsel:

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
FUND OF THE NATIONAL
CAPITAL AREA
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

November 15, 1982

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1863

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES, ET AL.,

Petitioner,

v.

MARY T. GRACE, ET AL.,

Respondent,

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Of Counsel:
RUBEN BONILLA
MARIO OBLEDO
L.U.L.A.C.
P.O. Drawer 5427
2590 Morgan Avenue
Corpus Christi, TX
78405

ROBERT L. GNAIZDA
Counsel of Record
SIDNEY M. WOLINSKY
ANITA P. ARRIOLA,
Law Graduate
PUBLIC ADVOCATES, INC.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

Attorneys for Amicus Curiae

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iv
STATEMENT OF INTEREST.....		1
SUMMARY OF ARGUMENT.....		4
ARGUMENT		11
I.	UNDER FIRST AMENDMENT STANDARDS, SECTION 13k IS OVERBROAD AND VAGUE AND IS THEREFORE UNCONSTITUTIONAL.....	11
	A. Section 13k is Overbroad.....	11
	B. Section 13k is Vague..	17
II.	THE SUPREME COURTHOUSE GROUNDS ARE A PUBLIC FORUM AND ACCORDINGLY SECTION 13k IS INVALID BECAUSE IT UNDULY RETRICTS CITIZENS' RIGHT OF ACCESS TO THE COURT.....	23

Table of Contents, continued

Page

A. The Supreme Court, As a Branch of the National Government, Should Be Open to Citizens to Use for Expressive Activities, Especially Since it is Viewed as the Bastion of First Amendment Freedoms..... 23

B. Because Access to the Supreme court is Restricted to Those Who Can Afford It, the Courthouse Grounds Should Be Open to the Pubic As an Alternative Forum in Which to Express Their Views to the Court..... 33

III. THE GOVERNMENT'S INTEREST IN PRESERVING THE APPEARANCE OF THE FAIR ADMINISTRATION OF JUSTICE DOES NOT APPLY TO THE SUPREME COURT..... 43

A. Members of the Supreme Court Are Not Affected by Popular Attempts to Influence Their Decisions..... 43

Table of Contents, Continued

Page

B. Because of the Political Nature of Their Offices and of the Cases Before the Court, the Fear That the Justices Will Be Influenced by Public Expression Outside the Court Is Without Merit.... 49

CONCLUSION..... 59

TABLE OF AUTHORITIES

Cases	Pages
A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975)	28n
Bellotti v. Baird, 428 U.S. 132 (1976)	38
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	12,16
Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975)	38
Cox v. Louisiana, 379 U.S. 559 (1965)	43
Dombrowski v. Pfister, 380 U.S. 479 (1965)	12
Flast v. Cohen, 392 U.S. 83 (1968)	36
Folie v. Connellie, 435 U.S. 291 (1978)	33
Gilligan v. Morgan, 413 U.S. 1 (1973)	36-37
Grace v. Burger, 665 F.2d 1193 (D.C. Cir. 1981)	25n

Cases, continued — Pages

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 23-24,29

Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C.) aff'd, 409 U.S. 972 (1972)..... 28n

Jordan v. DeGeorge, 341 U.S. 223 (1951)..... 18

Laird v. Tatum, 408 U.S. 1 (1972)..... 37n

Laird v. Tatum, 409 U.S. 824 (1972) (mem.), petition for rehearing denied, 409 U.S. 901 (1972)..... 46

Martin v. City of Struthers, 319 U.S. 141 (1943)..... 43

Mathews v. Diaz, 426 U.S. 67 (1976)..... 33

Monroe v. Pape, 365 U.S. 167 (1962)..... 38

Muskrat v. United States, 219 U.S. 346 (1911)..... 36

NAACP v. Alabama, 377 U.S. 288 (1964)..... 11-12

Cases, continued	Pages
O'Shea v. Littleton, 414 U.S. 488 (1973).....	37n
Poe v. Ullman, 367 U.S. 497 (1961).....	36
Roe v. Wade, 410 U.S. 113 (1973)...	36,56
San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973)....	34
Shelton v. Tucker, 364 U.S. 479 (1960).....	11
Sierra Club v. Morton, 405 U.S. 727 (1972).....	36
Smith v. Goguen, 415 U.S. 566 (1974).....	18,22
Stone v. Powell, 428 U.S. 465 (1976).....	38
Tinker v. Des Moines Comm. School District, 393 U.S. 503 (1969).....	15
United States v. Nixon, 418 U.S. 683 (1974).....	57
Zwickler v. Koota, 389 U.S. 241 (1967).....	18,21

Constitution and Statutes	Pages
U.S. Const. amend. I.....	passim
U.S. Const. amend. XI.....	38
U.S. Const. amend. XVI.....	54
U.S. Const. art. III, § 1.....	45
U.S. Const. art. III, § 2, cl. 1.....	36
18 U.S.C. § 1507.....	25n
28 U.S.C. § 455.....	46,46n
28 U.S.C. § 2109.....	8n
40 U.S.C. § 13c.....	22
40 U.S.C. § 13k.....	passim

Miscellaneous	Pages
116 Cong. Rec. 17511 (1970).....	51
127 Cong. Rec. S 10123 (1981)....	51
127 Cong. Rec. S 10131 (1981)....	51
G. Gunther, Cases and Materials on Constitutional Law (10th ed. 1980).....	41n
Guide to the U.S. Supreme Court (1979).....	40,44n
Hearings on the Nomination of Sandra Day O'Connor before the Senate Committee on the Judiciary, 97th Cong. 1st Sess. (1981).....	50n
Hearings on the Nomination of Thurgood Marshall before the Senate Committee on the Judiciary, 90th Cong. 1st Sess. (1967).....	50n
Hearings on the Nomination of William Brennan before the Senate Committee on the Judiciary, 85th Cong., 1st Sess. (1957).....	50n

Miscellaneous, continued — Pages

Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. before the Senate Committee on the Judiciary, 92d Cong. 1st Sess. (1971)..... 50n

H.R. 867 97th Cong. 1st Sess. (1981)..... 53

J. Frank, Marble Palace: The Supreme Court in American Life (1958)..... 39

Note, Recess Appointments to the Supreme Court -- Constitutional but Unwise? 10 Stan. L. Rev. 124 (1957)..... 45

Sager, The Supreme Court: 1980 Term, 95 Harv. L. Rev. 17 (1981)..... 53

San Francisco Sunday Examiner & Chronicle, Oct. 3, 1982 at A13, col. 4..... 35,41n,57

S. 210, 96th Cong., 1st Sess. (1979)..... 52

S. 1005, 97th Cong., 1st Sess. (1981)..... 52

Miscellaneous, continued — Pages

S. Wasby, The Supreme Court in the Federal Judicial System (1978)..... 37n,42, 42n

The Federalist No. 78 (1961 ed.) (A. Hamilton)..... 47,48

The Supreme Court of the United States (prepared by the Supreme Court Historial Society)..... 30,31, 41n,44n

The League of United Latin American Citizens ("LULAC) submits this brief as amicus curiae in support of Respondents with the written consent of all parties, pursuant to Rule 36.2 of this Court.

STATEMENT OF INTEREST

The League of United Latin American Citizens is a fifty-three year old non-profit organization. It is an outspoken advocate on behalf of fourteen million Hispanics, with emphasis on civil, consumer, economic, educational, employment and political rights rights of America's second largest minority.

LULAC, with approximately 100,000 members in more than forty states, is believed to be the largest national Hispanic membership organization in the

nation.

LULAC, because of its volunteer, non-profit status and the modest means of its members and the Hispanic community at-large, is particularly concerned as to:

a) the increasingly high cost of U.S. Supreme Court litigation which, in effect, precludes 95 percent of the population from access to the court;

b) the highly selective and often political nature of the cases heard by the Court;

c) the rulings of the Court that create barriers to legal access (such as restrictions on class actions and standing); and

d) the increasingly anti-civil rights posture of the Supreme Court.

These four factors often make legal

access to the Supreme Court more a fiction than a reality for Hispanics and other minorities.

LULAC therefore believes that it is especially important that no governmental statutes or regulations be permitted to hinder or interfere with the absolute right of the people to peacefully express their views, pursuant to the First Amendment, before any government institution and, in particular, the United States Supreme Court.

SUMMARY OF ARGUMENT

LULAC contends that if there is one institution in America that should have no restrictions or barriers regarding the people's First Amendment rights, it should be the United States Supreme Court.

It is ironic that the governmental institution that historically has done more to protect First Amendment rights, and is indeed considered one of the most formidable bastions of those rights in the world, should be asked to carve out a special First Amendment exemption solely for itself.

It is undisputed that freedom of expression outside federal and state courthouses, despite impressionable juries and witnesses (as well as short-term elected judges in most states), has not

cost our great judicial system its independence or its integrity. How then can it be argued that lifetime tenure of U.S. Supreme Court Justices, rendering decisions without either juries or witnesses, will be so influenced or intimidated by statements on the sidewalk that the integrity and independence of the Court will be threatened?

It is most difficult to find a compelling governmental interest in barring a few signs or chants almost a football field and two sets of massive doors from the Supreme Court chambers. How can such intimidate the United States Supreme Court, while the Washington Post, CBS News and Congress

//

//

cannot? [1]

LULAC contends that the court is and must be the citadel and symbol of free expression. It therefore takes a First Amendment position well beyond that advocated by either of the parties. LULAC respectfully urges that this Court not only invalidate 40 U.S.C. §13k, but specifically order the Supreme Court Marshall to develop "Hyde Park" plans, to be instituted no later than July 4, 1983, to

---

[1] The government's obsession with banning free expression of the people is particularly puzzling in light of the Washington Post having a vending machine on the very sidewalk barred to the public and a quasi-pornographic paper, Met Forum, "Washington's Most Complete Adult Guide" also being permitted to exercise its First Amendment rights on this Supreme Court sidewlk. (Met Forum features, for example, ads such as, "Dominant lady and submissive mate seek couples and females for B/D, fantasy fulfillment, personal surrender and erotica." October 1982 at 24)

warmly welcome and encourage any and all forms of peaceful expression, picketing and demonstrations in front of and on the Court grounds, including expressions relating to issues before the Court.

The Order to the Marshall should include, inter alia, provision for such expressions, without limits as to their content or subject matter, on the one hundred foot wide court plaza, as well as on the sidewalk in front of the Supreme Court.

The U.S. Supreme Court's posture on free expresion should be to America what Hyde Park is to Great Britain, the creator

of many of our proud common law traditions.[2]

LULAC contends that the greatest danger facing the Court is its actual and perceived isolation from the public. (For example, a majority of the Justices of the Supreme Court completed their college education prior to the advent of the Second World War and this nation has not had an Hispanic Supreme Court Justice.)

Such isolation (and attendant secrecy) when combined with an unjustified special exemption barring effective public criticism, could cause disrespect for the court

---

[2] LULAC contends that this Court should not be hearing this case. Despite the justices' interest in the outcome of the case, the Court has not seen fit to disqualify itself and to defer to another federal court to resolve the issues in this case. See, e.g., 28 U.S.C. §2109.

and a questioning of its legitimacy.

In an era of unaffordable litigation, highly selective and political Supreme Court dockets, and increasing restrictions on standing and other procedural rights of access, it is particularly important that all of the people of the United States have an opportunity to peacefully express their views on all issues, including issues directly before the Court.

For the overwhelming majority of Americans that cannot afford $200-per-hour attorneys and million dollar landmark litigation, the opportunity to express their views on the steps of the Supreme Court may be as close as they will ever get to justice. The public should not be denied this opportunity, particularly not by the United States Supreme Court, one

of the most important (if not the most important) political institutions in this nation.

In summary, the Supreme Court can best protect its integrity and independence by avoiding special privileges and immunities. Instead, it should openly encourage and welcome free expression everywhere free men and women reside, including at the Court itself.

//

//

//

//

//

//

//

//

//

ARGUMENT

I. UNDER FIRST AMENDMENT STANDARDS, SECTION 13k IS OVERBROAD AND VAGUE AND IS THEREFORE UNCONSTITUTIONAL

A. Section 13k Is Overbroad

It has long been recognized that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Shelton v. Tucker, 364 U.S. 479 (1960). Thus, it has been held that "a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP

v. Alabama, 377 U.S. 288 (1964). This overbreadth doctrine has two qualifications: enforcement of an overbroad statute is totally forbidden (1) until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression, Dombrowski v. Pfister, 380 U.S. 479 (1965); or (2) where conduct and not merely speech is involved, the overbreadth of a statute must "not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Section 13k is unquestionably overbroad because of the distinct possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

On its face, the statute deters constitutionally protected speech and conduct. For example, it would be unlawful for persons to wear buttons, armbands or other insignia publicizing their views. It would also be unlawful for schoolchildren or tour groups to "move in processions" in the area near the Court or for law students to "stand" in line waiting to hear oral argument before the Court. Similarly, it would be unlawful for attorneys or parties with cases pending before the Court to respond by talking to the press or distributing press releases on the steps of the building. The use of bus and parking signs on the sidewalks surrounding the court would be prohibited. Finally, the statute would prohibit the dissemination

of information through the use of newspaper vending machines which are presently situated on the corner. The statute reaches and punishes all forms of expression, be they speech or conduct, related or unrelated to Supreme Court business. Thus, because of the numerous impermissible applications of the statute, Section 13k causes many to refrain from constitutionally protected speech or expression.

Section 13k cannot be saved by the use of a limiting or narrow construction of the statute. In its brief, the Government urges that Section 13k has been narrowly construed by the Marshall of the Supreme Court to prohibit only picketing, leafleting, and demonstrating. Brief for Petitioner at 3. However, in

his Declaration, the Marshall stated that the statute was enforced against those persons who engaged in "expressive conduct, including carrying a sign, passing out leaflets or participating in a demonstration. . ." Declaration of the Marshall of the Supreme Court at 3. This statement does not seem to limit section 13k but rather it merely includes leafletting, demonstrating, etc. Although wearing armbands has been held to be "closely akin to 'pure speech'", Tinker v. Des Moines Ind. Comm. School District, 393 U.S. 503, 505 (1969) arguably this conduct would fall witin the category of "expressive conduct."

Were the court to interpret the statute narrowly to prohibit only leafletting, picketing, and demonstrating, section

13k would still be overbroad since it would apply to expressive conduct both related and unrelated to Surpeme Court business. Where conduct and not merely speech is involved, the overbreadth of a statute must "not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Section 13k, if limited to those three forms of expressive conduct, would prohibit a substantial spectrum of conduct. The Supreme Court building houses more than the Supreme Court. It also contains a gift shop, a cafeteria, exhibits open to the public, and other offices. Section 13k would prevent picketing or demonstrations by employees who claimed they were discharged from employment illegally; or persons who claimed improper treatment by the Supreme

Court police. Additionally, persons distributing newspapers, advertisements or leaflets with religious contents would be banned from the premises, thereby inhibiting the exercise of religion. There are thus a substantial number of situations to which section 13k would invalidly apply and the potential deterrent effect on these forms of expressive conduct is therefore great. Because section 13k constitutes an excessively broad means of impinging on an area of protected First Amendment rights, the statute should be held void on its face.

B. Section 13k Is Vague.

In addition to being overbroad, Section 13k suffers from the defect of vagueness. In the First Amendment context, challenging a statute on grounds of

vagueness requires proof that the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Zwickler v. Koota, 389 U.S. 241, 249 (1967). The vagueness challenge rests ultimately on the procedural due process requirement of notice as to the proscribed conduct. Jordan v. DeGeorge, 341 U.S. 223 (1951). Additionally, one special purpose of the doctrine is to require legislatures to set "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" Smith v. Goguen, 415 U.S. 566, 573 (1974).

A mere reading of the statute alone

substantiates the challenge of unconstitutionality. Taking the first part of the statute, "It shall be unlawful to parade, stand, or move in processions or assemblies in the Supreme Court building or grounds," it is difficult to imagine the types of activities that would not be proscribed by the statute. By itself, the mere act of parading, standing, or moving in the Supreme Court building or grounds cannot be considered conduct that requires regulation. Otherwise, persons standing at the sidewalk awaiting arrival of a bus or taxi would be in violation of the statute. Likewise, tourists posing for photographs in front of the Supreme Court building would fall within the prohibition. The descriptive terms "in processions or assemblies" render no aid in defining the

types of conduct prohibited by the statute. Thus, for example, a picture-taking session of the members of the Supreme Court assembled on the steps of the court grounds would fall within the purview of the statute.

The second part of the statute is equally unclear. That part provides: "It shall be unlawful . . . to display [in the Supreme Court building or grounds] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." This section of the statute is capable of being interpreted in various ways. As in the discussion of the overbreadth doctrine, supra, this part of the statute might prohibit the wearing of armbands and might also require the removal of the

newsstands that are presently situated on the corner of the sidewalk in front of the Court. Those persons wearing pins or buttons advocating a certain view might come within the prohibition of the statute. Similarly, persons who wear hats or other head apparel signifying their association with a religious or other group might violate the statute.

Both sections of the statute forbid the doing of an act "in terms so vague that men of intelligence must necessarily guess at its meaning and differ as to its application." 389 U.S. at 249. The law's requirement that fair notice be given as to what is prohibited conduct is not met here, since the statute is not at all clear as to what constitutes proscribed and protected conduct. Finally, the

statute must be invalidated in order to prevent "arbitrary and discriminatory enforcement." 415 U.S. at 573. The Marshall's "narrow" interpretation of the statute does not limit the statute's prohibition of certain types of conduct but merely includes the kinds of conduct to which the Marshall will attempt to enforce the statute. See discussion on overbreadth doctrine, supra. Moreover, the Marshall's power to enforce section 13k derives from a statute that delegates virtually standardless discretionary power. See 40 U.S.C. § 13c. There is neither a license nor a permit system to accomodate the First Amendment rights of the public, and section 13k constitutes a blanket prohibition on these rights.

For the foregoing reasons, section

13k must be found to be unconstitutional since it is overbroad and vague and therefore unduly burdens the exercise of First Amendment rights.

II. THE SUPREME COURTHOUSE GROUNDS ARE A PUBLIC FORUM AND ACCORDINGLY SECTION 13k IS INVALID BECAUSE IT UNDULY RESTRICTS CITIZENS' RIGHT OF ACCESS TO THE COURT.

A. The Supreme Court, As A Branch Of The National Government, Should Be Open To Citizens To Use For Expressive Activities, Especially Since It Is Viewed As The Bastion Of First Amendment Freedoms.

The Government's analysis of the public forum cases decided by the Supreme Court mischaracterizes the nature of the issue in this case. Here, the critical question is whether the expression is "basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of

Rockford, 408 U.S. 104, 116 (1972), and not whether it falls into any of the categories used in the Government's tripartite analysis. Further, the Government incorrectly argues that "Cox II establishes that courthouse grounds are not a public forum", Brief for Petitioner at 20, and that "'no matter who you are or what your grievance, you cannot picket the courthouse.'" Id. quoting Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 11, 10.

Assuming for the moment that Cox II does establish that one cannot picket a courthouse, it is Amicus' position that the grounds of the Supreme Court must be

//

//

//

exempted from this rule.[3] In a sense, all courts are policy makers, yet the Supreme Court's policy-making, primarily through its interpretation of statutes and the Constitution, is far more visible than that engaged in by many lower courts. The potential applicability of the Supreme Court's cases to the entire nation also makes most of its rulings of far greater policy relevance than those of most other

---

[3] The Court of Appeals held that 18 U.S.C. § 1507 addressed the government's concern of attempts to interfere with the administration of justice and also noted that a state statute modeled on section 1507 was upheld in Cox II. Grace v. Burger, 665 F.2d 1193, 1203 (D.C. Cir. 1981). However, LULAC urges that section 1507 must also be ruled unconstitutional since, as discussed below, there is no compelling government interest to support the prohibition of expressive conduct contained in that statute. In Part III, infra, LULAC demonstrates that the government's concern with the appearance of the fair administration of justice does not apply to the Supreme Court.

courts. The public reaction to the Court's policy making forces the Court to become an actor in the political system and hence subjects it to public scrutiny and criticism, much more so than in the case of other courts.

Another major way in which the Supreme Court differs from most other courts, which must take most cases brought before them, is in being able to control the cases it will hear. Perhaps most important in making the Supreme Court an exceptional court is the simple fact that it sits atop the judicial system not only of the national government but of the judicial systems of all the states. Thus, although political action can be taken to reverse or limit what the Court has done, there is no other court to which one can

appeal. The Court's ability to choose its cases coupled with its paramount position gives it rulings the widest possible influence.

Because of the Supreme Court's status both as a court and as a branch of the national government, it is an appropriate forum for the dissemination of information and ideas and is an appropriate subject of

//

//

//

//

//

//

//

//

//

//

public opinion.[4] In fact, foremost among individual rights are those protected and established by the First Amendment, and the

---

[4] It should be noted that demonstrations near the other two branches of government are constitutionally protected. See Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, 584 (D.D.C. (three-judge court), aff'd, 409 U.S. 972 (1972) (demonstrations on Capitol grounds are permissible because Congress is appropriately subject to public opinion); A Quaker Action Group v. Morton, 516 F.2d 717, 725 (D.C. Cir. 1975) (White House area is a "unique situs" for the exercise of First Amendment rights). Additionally, no other statutes or regulations restrict First Amendment rights on courthouse grounds in the same manner or to the same extent that Section 13k does. The Supreme Court is therefore in the anomalous position of being the only court and the only branch of national government which prohibits the use of its grounds for expressive purposes. Such a position is at odds with the first Amendment principles enunciated by the Court and is incomprehensible to a society that looks to the Court for guidance and protection of its free speech rights.

Court has traditionally been viewed as the bastion of First Amendment freedoms. Given the status of the Court and its particular solicitude of First Amendment rights, it would be highly ironic for the Court to sanction the suppression of constitutionally protected speech and conduct on its own premises, while mandating otherwise in other places.

It only remains to be determined whether the expression prohibited by Section 13k is "basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 116. Section 13k prohibits not only pure speech, but picketing, leafletting, and demonstration as well. These forms of expression are prohibited at all times in and around the grounds of the Supreme Court

and without regard to whether they relate to judicial business. The "normal activity" of the Supreme Court consists of the terms of the Supreme Court which begins on the first Monday in October and the Court sessions continue until early July. The term is divided between "sittings" for the hearing of cases and delivering of opinions, and intervening "recesses" for the consideration of the business before the court and the writing of opinions. Sittings and recesses alternate at approximately two week intervals. The Supreme Court of the U.S. 10 (prepared by the Supreme Court Historical Society) [hereinafter cited The Supreme Court].

When the Court is sitting, public sessions begin promptly at 10 a.m. and continue until 3 p.m., with a one-hour

lunch recess starting at noon. With rare exceptions each side is allowed thirty minutes argument and generally 22 to 24 cases are argued at one sitting. No public sessions are held on Thursday or Fridays. On Fridays during and preceding argument weeks, the Justices meet to discuss the argued cases and to discuss and vote on petitions for review. Id.

The Justices are therefore in court three days a week, four hours a day during the "sittings". In sum, they are in court only 17 weeks or 51 days out of a 34-week term. The nature of the Court -- as a branch of the national government -- makes the Court a prime site for the focus of public grievances. The expression of these grievances in the form of picketing, leafletting, and demonstrating would not

materially disrupt normal Court activities, particularly since the Court is in session just a few weeks out of the entire year. Session 13k goes further than to merely prevent interference with the judicial processes. It unnecessarily and substantially infringes on First Amendment rights and is not tailored to further any compelling interest, particularly since, as discussed in Part III, infra, the Government's asserted interests do not apply here. Finally, the expressive conduct sought to be prohibited by section 13k is especially compatible with the activity in which the Court is engaged -- making law and policy which have wide-ranging impact on all segments of society.

//

//

B. Because Access To The Supreme Court Is Restricted To Those Who Can Afford It, The Courthouse Grounds Should Be Open To The Public As An Alternative Forum In Which To Express Their Views To The Court.

Amicus in this case represents the League of United Latin American Citizens (LULAC), an organization which is deeply concerned about citizens' access to the courts. It is particularly concerned about access to the Supreme Court because of the many recent decisions that adversely affect Hispanics and low-income persons. For example, in Folie v. Connellie, 435 U.S. 291 (1978), the Court held that the state of New York could bar employment of aliens as state troopers, exercising deferential review rather than strict scrutiny for classifications based on alienage. In Mathews v. Diaz, 426 U.S. 67 (1976), the

Court upheld Congress' conditioning of alien's eligibility for participation in federal Medicare program on admission for permanent residence and continuous residence in the U.S. for five years. In 1973, a class action suit was brought by Mexican-American parents of children attending schools in Englewood Independent School District in San Antonio, suing on behalf of children of poor families residing in districts having a low property tax base. The Court held that the public school financing system which creates wealth-based classification is subject to the rational basis test rather than strict judicial scrutiny. San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973). This term, the Court is confronted with a case

involving Texas' attempt to bar Mexican children who don't live with a parent or guardian from being provided with free education. San Francisco Sunday Examiner & Chronicle, October 3, 1982, at A13, col. 4.

Amicus disputes the government's contention that the Supreme Court is "informed by vigorous debate within the courtroom," Brief for Petitioner at 11, 36, particularly because access to the Court is restricted to those few who can afford it and who can satisfy the Court's requirements as to who can have access and which cases can be brought.

The judicial requirements that eliminate many potential cases at earlier stages revolve around the constitutional

requirement that courts may deal only with with "cases or controversies." U.S. Const. art. III, § 2, cl. 1. These requirements include the basic rule that the Supreme Court will not issue advisory opinions, Muskrat v. United States, 219 U.S. 346 (1911); that the person bringing the case have standing to sue, see, e.g., Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968); that the case be both "ripe" and not moot, see Roe v. Wade, 410 U.S. 113 (1973); Poe v. Ullman, 367 U.S. 497 (1961); and that it not entail a "political question," Gilligan v. Morgan,

//

//

//

//

413 U.S. 1 (1973).[5]

Other access restrictions are those that have as their underlying rationale the idea that state courts should decide as much as possible before claimants may bring cases into the federal court system and that, when such claims are brought

---

5 These doctrines on access to the courts have changed over time and are dependent to a large extent on the ideology of the justices and whether or not the judicial process is viewed as a narrow, adversary forum. For example, the Warren Court generally made access to the courts easier, while the Burger Court has been considerably more restrictive. See generally S. Wasby, The Supreme Court in the Federal Judicial System 111 (1978) [hereinafter cited as Wasby]. For examples of the Burger Court's restrictive rules, see O'Shea v. Littleton, 414 U.S. 488 (1973) (denial of standing to plaintiffs who sued to obtain relief from racially discriminatory bonding, sentencing, and jury fee practices because no showing of injury); Laird v. Tatum, 408 U.S. 1 (1972) (Court refused to hear challenge to Army surveillance of civilian political activity as unripe because only a subjective "chill" to First Amendment rights involved).

into the system, review of state court decisions should be limited. Foremost among these rules are those restricting the filing of federal cases against states and state officials, see U.S. Const. amend. XI; Monroe v. Pape, 365 U.S. 167 (1962); the doctrine of abstention, Bellotti v. Baird, 428 U.S. 132 (1976); the rule that state court action be "final" so that appeal to the Supreme Court is proper, see Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975); and limitations on federal habeas corpus petitions, Stone v. Powell, 428 U.S. 465 (1976).

Despite the fact that the above-mentioned access requirements have eliminated many potential cases at earlier stages, the Court itself removes more. Since enactment of the Judiciary Act of

1925, the Supreme Court has had almost complete discretion to decide for itself what cases it would hear. J. Frank, Marble Palace: The Supreme Court in American Life, 15 (1958).

The decision whether to grant or deny review of a case is made in conference. Conferences are held in strict secrecy; only the justices attend, and no legal assistance or staff are present. A few days before the conference convenes, the Chief Justice compiles a "discuss list" -- a list of cases deemed important enough for discussion and a vote. Appeals are placed on the "discuss list" almost automatically, but as many as three-quarters of the petitions for certiorari are denied a place on the list and thus rejected without further consideration.

Guide to the U.S. Supreme Court 735 (1979) [hereinafter Guide]. A traditional but unwritten rule specifies that it takes four affirmative votes to have a case scheduled for oral argument. Id. Additionally, the justices can summarily dispose of a number of other cases through brief orders. This highly selective and discretionary procedure in which the justices decide which cases to review prevents a tremendously large percentage of

//

//

//

//

//

//

//

//

persons from gaining access to the Court.[6]

Finally, the prohibitive costs of bringing a case to the Supreme Court are sufficient to deter most individuals who generally cannot afford to finance the costs of a lawsuit. Including filing

---

6 The Court's caseload has increased steadily, reaching a total of 5,311 cases on the docket for the Term ending July 1982. In 1960, only 2,313 cases were on the docket, and in 1945, only 1,460. Plenary review, with oral arguments by attorneys, is granted in only only 180 to 200 cases per Term. The Supreme Court at 11.

This term begins with 111 hours already committed to hearing oral arguments on cases from the previous year. A maximum of 160 hours of arguments is accepted each term. San Francisco Sunday Examiner & Chronicle, October 3, 1982, at A12, cols. 1-2. Thus, while there has been a striking increase in the annual number of cases, the number of cases disposed of with full opinion has not varied significantly over the years. Accordingly, the percentage of cases in which review is granted has declined as the number of request for review has grown. G. Gunther, Cases and Materials on Constitutional Law 73 (10th ed. 1980).

fees, purchase of a transcript, and the printing of briefs, such costs may exceed $20,000 just to bring a case to the certiorari petition stage even if lawyers have donated their time. Wasby at 130 (1978 estimate).[7]

Because of the almost insurmountable obstacles in bringing a case to the Court, it is of the utmost importance that citizens who are denied access to the Court are able to express their views or grievances to the Court in some other manner. Section 13k, which dictates a blanket prohibition on expressive conduct

---

[7] In the early 1950s, the five cases in Brown v. Board of Education, including the Supreme Court litigation, cost between $200,000 and $250,000. Today, of course, the figure would be much higher because of inflation. Wasby at 130.

on the Supreme Court grounds, bars a means of communiction that is "essential to the poorly financed causes of little people," Martin v. City of Struthers, 319 U.S. 141, 146 (1943), and it should therefore be ruled invalid.

III. THE GOVERNMENT'S INTEREST IN PRESERVING THE APPEARANCE OF THE FAIR ADMINISTRATION OF JUSTICE DOES NOT APPLY TO THE SUPREME COURT.

A. Members Of The Supreme Court Are Not Affected By Popular Attempts To Influence Their Decisions.

The Government in this case relies on Cox v. Louisiana, 379 U.S. 559 (1965) [hereinafter Cox II] to support its argument that the interest in preserving the appearance of the fair administration of justice is sufficient to prohibit speech in the building and grounds of the

//

Supreme Court. Brief for Petitioner at 20, 25. While this is a legitimate interest as applied to other courts, it is totally inapplicable to the Supreme Court.

Unlike other courts, there are no juries or witnesses in the Supreme Court that can be swayed by public opinion or influence. Because its members are not subject to periodic re-election but are appointed for life,[8] the actions of the Justices are not influenced by popular

---

[8] Length of service on the court has varied greatly, from 15 months to 36 years. See Guide at 790. The Justices serve for an average of 15 years. The Supreme Court at 8. Longevity of service is, of course, related to the composition of the Court at any given time and the manner in which cases are decided. For example, Justices William O. Douglas and Hugo L. Black, who served 36 years, 7 months and 34 years, 1 month respectively, were certainly two of the most controversial justices on the Court.

pressures in an effort to gain favorable consideration by voters. Indeed, once a nominee has been confirmed, life tennure places him or her beyond the influence of even Congress or the Executive. Note, Recess Appointments to the Supreme Court -- Constitutional but Unwise?, 10 Stan. L. Rev. 124, 139 (1957). Moreover, the only requirement for staying in office is that the members of the Court hold their offices "during Good Behavior," U.S. Const. art. III, § 1, and while there have been a few attempts to impeach some members, those attempts have never resulted in conviction. Thus, once the nominees have been confirmed and are installed as members of the Court, the public has virtually no way of ousting them from office. Furthermore, on a motion for

disqualification of one of the justices, see 28 U.S.C. § 455, under the existing practice of the Court disqualification has been largely a matter of individual decision and there is no appeal from a justice's denial of that motion. Laird v. Tatum, 409 U.S. 824 (1972 (mem.), petition for rehearing denied 409 U.S. 901 (1972).[9]

Amicus does not dispute the government's contention that the complete independence of the courts is essential to the fair administration of justice. However, as a branch of the national government, the necessity of preserving the independence

---

[9] It is Amicus' position that the justices should have disqualified themselves from hearing this case, since they have an interest in the outcome of the litigation. 28 U.S.C. § 455.

of the Supreme Court is different in kind than that of the lower courts. The Supreme Court is not threatened by public influence but rather by attacks from the executive and legislative branches. In fact, the election of the justices by the people was rejected precisely because it was feared that "there would be too great a disposition to consult popularity" in its interpretation of the Constitution and other laws. The Federalist No. 78 at 465 (1961 ed.) (A. Hamilton).

Far from viewing the Court as the subject of attacks by the people, the Framers perceived the function of the Court as the protector of the people from legislative misconduct; that is, as "an intermediate body between the people and the legislature, in order, among other

things, to keep the latter within the limits assigned to their authority." Id. at 467. The independence of the judges is thus "requisite to guard the Constitution and the rights of individuals" from the "dangerous innovations in the government," Id. at 469, and not to guard against public pressures, since such pressures have no effect on the Court and its decision-making processes.

Of course, the Justices' opinions are inevitably, if not consciously, influenced by the interests of major sections of the public. But, to suggest, as the Government does here, that the Court's decisions will be motivated solely by public opinion is to ignore the restraints placed upon the Court -- they are restrained by the written Constitution,

by precedent, and by popular will expressed through the elected branches of government.

B. Because Of The Political Nature Of Their Offices And Of The Cases Before The Court, The Fear That The Justices Will Be Influenced By Public Expression Outside The Court Is Without Merit.

To argue, as the Government does here, that the Supreme Court must be free from popular political influences is to ignore the political context in which the Justices are appointed and in which they act. The very nature of the Court indicates that it is a political creature, composed of politically appointed members[10]

---

10 The questioning of Supreme Court nomminees has often touched upon the most politically controversial issues before the Court. For example, Senator McCarthy pressed William Brennan for an explication of his views on "the all-important issue of whether or not communism is merely a political party or

(Footnote continued on next page)

and given the responsibility of resolving politically controversial issues.

(Footnote 10, continued)

whether it represents a conspiracy to overthrow this government." Hearings on the Nomination of William Brennan before the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 18 (1957). Senators McClellan and Ervin insistently sought a declaration by Thurgood Marshall of whether he agreed with the court's then recent decisions in Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964). Hearings on the Nomination of Thurgood Marshall before the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 12-14, 53-58 (1967). Senator Kennedy tried to elicit William Rehnquist's views on the constitutionality of Congressional atempts to limit the Vietnam War, Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. before the Senate Committee on the Judiciary, 92d Cong., 1st Sess. 33 (1971); on prior restraint of the press Id. at 39; and on apportionment Id. at 56. Most recently, Sandra Day O'Connor was pressed to reveal her views on the constitutionality of abortion. See Hearings on the Nomination of Sandra Day O'Connor before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 107-08, 198-99, 218 (1981).

Without question, the nomination and appointment of members of the Supreme Court are based on political considerations. See 127 Cong. Rec. S 10123 (1981) (citing President Reagan's pledge to appoint pro-life judges to "all levels of the judiciary"); 127 Cong. Rec. S 10131 (1981) (Statement of Senator Hatch in suport of nomination of Sandra Day O'Connor, reciting Judge O'Connor's conservative credentials); 116 Cong. Rec. 17511 (1970) (citing President Nixon's pledge to appoint only "judicial conservatives"). Moreover, it is indisputable that the Court's decisions are in some manner influenced by the personal political philosophy of its members. Although most nominees have stated their intent to

put their personal predilictions aside once appointed to the bench, some influence seems to be inevitable.

The members of the Supreme court are not immune from political pressures and public opinion. When the Court takes the lead in confronting the critical social and political issues in the national life, it attracts criticism. If certain groups in society oppose the Court on basic issues of national policy, these groups may react to the Court's decisions in various ways. They may attempt to challenge the very propriety and legitimacy of judicial review itself by removing certain types of cases from the Court's jurisdiction. See, e.g., S. 210, 96th Cong., 1st Sess. (1979) (Helms Admendment removing

jurisdiction over suits challenging State-sanctioned voluntary school prayers from the federal lower courts as well as the Supreme Court); H.R. 867, 97th Cong., 1st Sess. (1981) (depriving all federal courts, including the Supreme Court, of jurisdiction in cases involving state anti-abortion laws); S. 1005, 97th Cong., 1st Sess. (1981) (depriving all federal courts of jurisdiction to order school busing to achieve racial integration. See generally Sager, The Supreme Court: 1980 Term, 95 Harv.L.Rev. 17 (1981). Additionally, voters may elect and re-elect officials on the basis of their views about Supreme Court decisions.

Or they may attempt the more difficult process of overturning constitutional doctrines promulgated by the Court. See, e.g., U.S. Const. amend. XVI (income tax amendment passed after Court struck down income tax law as unconstitutional in Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895)).

These factors are part of the political realities that surround every major Court decision. As illustrated above, the Court is under attack daily right across the street by Congress. Yet there is no evidence that Court decisions have been so influenced by these challenges that its independence and ability to decide cases in a disinterested manner have been impaired. Similarly, there is no evidence that

leafletting, demonstrating and other forms of expressive conduct (which are far less dangerous and less threatening methods of influencing the Court) would affect the Court's processes in an adverse manner.[11]

The Government also argues that the building and grounds of the Nation's highest court should be "free from outside pressure and political controversy." Brief for Petitioner at 36.

---

11 It should be noted at this point that the government's contention that demonstrations will be viewed by the public as influencing the Court is substantially undercut when it argues in the same breath that as alternatives, demonstrations are allowed across the street from the Court or on the street in front of the Court. Brief for Petitioner at 15. Either way, the supposed danger of the public's perception of influence on the Court is the same whether the demonstration occurs on the sidewalk surrounding the Court or a few feet from the sidewalk.

Amicus disputes the notion that the Supreme Court is or should be free from outside pressure and political controversy. The Court has always thrust itself into the limelight of controversy by deciding highly political cases and by these actions it is therefore properly the subject of public opinion.

Among the most political and controversial cases decided by the Burger Court was Roe v. Wade, 410 U.S. 113 (1973), where the Court held that the constitutional right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. In another major political case, the Court held that sixty-four of President Nixon's tape recordings must be turned over to the United States. The generalized

assertion of presidential privilege was required to yield to the demonstrated, specific need for evidence in a pending criminal trial. United States v. Nixon, 418 U.S. 683 (1974).

Furthermore, the Court faces the prospect of deciding highly political cases this term, including challenges to a variety of state and local restrictions on abortions; the legality of California's ban on the construction of new nuclear reactors; and a challenge to the eleven-year-old federal policy of denying tax exemptions to private schools that discriminate against racial minorities. San Francisco Examiner & Chronicle, Oct. 3, 1982, at A13, cols. 1-4.

//

The Government's concern that the Court be free from outside pressure and political controversy is therefore misplaced in light of the political nature of the cases before the Court. The Court -- like any policy maker -- must and will act within the context of public opinion and influence. And the Court is and will continue to be in the center of political controversy until and unless there is some fundamental change in the constitutional distribution of governmental powers.

//

//

//

//

//

//

CONCLUSION

Amicus urges the Court to go further than to merely invalidate Section 13k. The Court should instruct, the Supreme Court Marshall to permit and encourage any and all forms of peaceful expression, picketing and leafletting, and demonstrations in front of and on the Court grounds, including expressions relating to issues before the Court.

Respectfully submitted,

Of Counsel:

Ruben Bonilla
Mario Obledo
LEAGUE OF UNITED LATIN AMERICAN CITIZENS
P.O. Drawer 5427
2590 Morgan Avenue
Corpus Christi, TX 78405
(512) 882-8284

Robert L. Gnaizda
Counsel of Record
Sidney M. Wolinsky
Anita P. Arriola,
Law Graduate
PUBLIC ADVOCATES, INC.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

Attorneys for Amicus Curiae

No. 81-1863

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES, ET AL.,
Petitioner,

v.

MARY T. GRACE, ET AL.,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this brief amicus curiae upon petitioner and respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

Rex. E. Lee
Solicitor General
Department of Justice
Washington, DC 20530

Sebastian K.D. Graber
Post Office Box 146
1019 King Street
Alexandria, VA 22313

Done this 10th day of November, 1982.

ROBERT L. GNAIZDA, ESQ.

NO. 81-1863-AFX	TITLE United States, et al., Appellants v. Mary T. Grace, et al.

DOCKETED	COURT
Apr. 7, 1982	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: Solicitor General
	Counsel for Appellees: Sebastian K. D. Graber
Jan. 29, 1982	Application for an extension of time to docket an appea and/or file petition for writ of certiorari and order granting same until April 9, 1982 by Brennan, J, on Feb. 2, 1982.
Apr. 7, 1982	Statement as to jurisdiction filed.(Record filed).
May 4, 1982	Order extending time to file a motion to dismiss or affirm until May 27, 1982.
May 27, 1982	Motion of appellees for leave to proceed in forma pauperis, and motion to affirm filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 21, 1982	The motion of appellees for leave to proceed in forma pauperis is GRANTED. Probable jurisdiction NOTED.

July 28, 1982	Motion of the parties to dispense with printing the joint appendix filed.
Aug. 4, 1982	DISTRIBUTED. SL15P4. (Above motion).
Aug. 5, 1982	Order extending time to file the appellants' brief on the merits until Sept. 4, 1982.
Sept. 10, 1982	Brief for the appellants filed.
Sept. 24, 1982	Order extending time to file the appellees' brief on the merits until Nov. 10, 1982.
Oct. 4, 1982	The motion of the parties to dispense with printing the joint appendix is GRANTED?
Nov. 3, 1982	Order further extending time to file appellees' brief on the merits until Nov. 15, 1982. (Orally ALS).
Nov. 15, 1982	Brief, amicus curiae, for The League of United Latin American Citizens filed.
Nov. 15, 1982	Brief, amici curiae, of The American Civil Liberties Union, et al. filed.
Nov. 15, 1982	Brief for the appellees filed. (D).
Jan. 11, 1983	Reply brief of the appellants filed. (D).
Jan. 18, 1983	ARGUED.